IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-962

HAWAIIAN TELEPHONE COMPANY

and

HAWAII EMPLOYERS COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES, and CHAMBER OF COMMERCE OF HAWAII,

*Joint Petitioners,*

v.

STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, ROBERT K. HASEGAWA, THOMAS S. BROWN,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1357, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1260, and HAWAII STATE FEDERATION OF LABOR, AFL-CIO,

*Respondents.*

## JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Joint Petitioners pray that pursuant to Rule 20 of the Rules of this Court a Writ of Certiorari issue in advance of the Judgment of the Court of Appeals for the Ninth Circuit to review a case there pending following decisions from the District of Hawaii.

The appeal of the Respondent Unions to the Ninth Circuit from the decision of the District Court for the District of Hawaii was docketed on March 19, 1976, (No. 76-1584) and that of the State of Hawaii on May 12, 1976, (No. 76-2056). The appeals were ordered consolidated on September 1, 1976. After opening and answering briefs had been filed, the State and the Unions filed a motion for summary reversal based upon the summary disposition of *Kimbell, Inc.* v. *Employment Security Comm'n*, 429 U.S. 804 (1976).

On February 18, 1977, the Court of Appeals entered an Order that the issues raised by the motion for summary reversal would be referred to the panel which will hear the appeals on their merits (2a,* ¶(c)). By March 18, 1977 all reply briefs were filed. Oral argument has not been scheduled.[1]

## Opinions Below

The opinion of the District Court granting Plaintiff Hawaiian Telephone Company (hereinafter "HAWTEL")

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* "a" page references are to the Appendix.

[1] Following perfection of these appeals the Court of Appeals for the Second Circuit entered its opinion in *New York Telephone Co.* v. *New York State Dep't of Labor*, 96 L.R.R.M. 2921 (Nov. 9, 1977). A petition for writ of certiorari to the Second Circuit was filed on January 4, 1978, in that case, Docket No. 77-961. Because the questions presented in that case are substantially the same as those in the case at bar and their resolution may be dispositive of this one, joint petitioners herein request that this matter be considered together with the petition in *New York Tel.* Should this joint petition not be granted at this time, petitioners Hawaiian Telephone Company, Hawaii Employers Council and the Chamber of Commerce of Hawaii request that it be considered as a brief *amicus curiae* in support of the petition for a writ of certiorari in *New York Tel.* The Chamber of Commerce of the United States intends to submit a separate brief as *amicus curiae* in support of the petition in *New York Tel.*



a preliminary injunction was entered on July 12, 1974, and is reported at 378 F.Supp. 791. (3a-19a) The final opinion, entered on October 14, 1976, and a final declaratory judgment and order, as amended, entered on February 9, 1975, are reported at 405 F.Supp. 275. (20a-56a)

## Jurisdiction

On April 23, 1976, the certified record from the District Court was filed in the Court of Appeals for the Ninth Circuit. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1), providing that cases pending in the courts of appeals may be reviewed upon the petition of any party by writ of certiorari before or after rendition of judgment.

## Questions Presented

Whether, consistent with the federal labor policy of free collective bargaining without government interference and the supremacy clause of the United States Constitution, each state may make a special accommodation for strikers in the form of unemployment compensation benefits.

Whether Congress has clearly manifested an intention to modify its policy of government neutrality in labor disputes so as to permit states significantly to affect collective bargaining by providing substantial unemployment compensation for strikers.

## Constitutional and Statutory Provisions Involved

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all

> Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

In pertinent part, the Hawaii Employment Security Law (Haw. Rev. Stat. Ch. 383) provides:[2]

> §383-30 *Disqualification for Benefits.* An individual shall be disqualified for benefits . . .
>
> (4) Labor dispute. For any week with respect to which it is found that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed; provided that this paragraph shall not apply if it is shown that:
>
> (A) He is not participating in or directly interested in the labor dispute which caused the stoppage of work; and
>
> (B) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or directly interested in the dispute; provided that, if in any case separate branches of work, which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same

[2] The construction of this statute which provides strikers with benefits is discussed, *infra*, at 7, and at 5a-6a and 45a-49a.



> premises, each such department shall, for the purpose of this subsection, be deemed to be a separate factory, establishment or other premises.

The preemptive federal policy of collective bargaining free from state interference is discussed *infra*, at pages 14-18.

## Statement of the Case

### 1. *Proceedings Below*

This suit was filed in the District Court by HAWTEL to prevent the processing for payment of claims filed by over 3,000 strikers for unemployment compensation amounting to more than $1,200,000. If paid, such benefits would have been charged against HAWTEL's unemployment insurance reserve account, resulting in the imposition of higher payroll taxes to replenish that account. The complaint, originally filed June 18, 1974,[3] alleged that, under the supremacy clause, Hawaii's scheme was preempted by federal labor law because it impinged upon HAWTEL's right under the National Labor Relations Act, 29 U.S.C. §§141 *et seq.*, to engage in collective bargaining free from governmental interference.

[3] The District Court's jurisdiction is discussed at p. 4a. On June 24, 1974, the International Brotherhood of Electrical Workers, Local 1357, AFL-CIO, which represents HAWTEL's employees, intervened on the ground it "is an interested party herein."

Following the District Court's July 12, 1974, opinion, the Chamber of Commerce of the United States, the Chamber of Commerce of Hawaii, the Hawaii Employers Council, the Hawaii State Federation of Labor, AFL-CIO, and International Brotherhood of Electrical Workers, Local 1260, AFL-CIO, were permitted to intervene as parties.

Reviewing essentially undisputed facts, the District Court granted HAWTEL a preliminary injunction and entered an opinion on July 12, 1974. (3a-19a)

After pre-trial conferences which resulted in numerous factual stipulations, the case was tried before the District Court on October 1, 2 and 3, 1974, and on December 10, 11, 12, 13 and 17, 1974. The court received extensive additional evidence concerning the impact of Hawaii's policy of providing significant unemployment compensation to strikers when the employer maintains substantial business operations during a strike.[4]

The District Court filed its decision on October 14, 1975, and a Declaratory Judgment and Order on November 17, 1975. The Order was amended upon motions filed by the defendants on February 9, 1976.

Timely appeals were filed in the Court of Appeals for the Ninth Circuit. As noted above, oral argument has not been scheduled in the Court of Appeals. See pages 1-2, *supra*.

On November 9, 1977, the Second Circuit entered its opinion in *New York Tel., supra,* creating a conflict between the Second and First Circuits relating to the issues pending before the Ninth Circuit in the instant case.[5]

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[4] Over one hundred exhibits were placed in the record, including numerous state administrative decisions providing the rationale for benefit allowance, the state's special procedures for strikers' claims, strike bulletins, post-strike literature authored by union members condemning this legal action as an effort to cripple the "right to strike," numerous news articles, and data relied upon by expert witnesses. The state also provided available data demonstrating that the payment of benefits to strikers has a direct impact on employer taxes.

[5] See p. 13, *infra*.



**2. *The Facts***

The District Court found that the present language of Haw. Rev. Stats. §383-30(4) has been in Hawaii's unemployment insurance law since 1941, but that it was not until the 1960's that Hawaii's policy of aid to certain strikers became fixed by the decision of the Supreme Court of Hawaii in *Meadow Gold Dairies* v. *Wiig,* 50 Haw. 225, 437 P.2d 317 (1968) granting benefits to strikers whose employers maintained substantial business operations during the strike. (5a-6a, 45a-49a)[6]

Just as HAWTEL began its 1974 negotiations[7] with Local 1357, IBEW, Honolulu's newspapers reported that over $100,000 in unemployment benefits had been paid economic strikers against Hawaiian Electric Company. (6a.)

HAWTEL's workers and their leaders knew of and considered the availability of benefits before commencing their strike on May 7, 1974 (31a-33a). The strikers were not permanently replaced, and they knew that "sooner or later" they would return to *their* jobs. Thus, their "unemployment" was temporary and self-induced. 13a.

As the Company continued to provide its subscribers throughout the state with telephone service using temporary employees and supervisors, the strikers, some of whom had inquired about the availability of benefits before deciding to strike (32a, 51a) applied on mass claim forms for

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[6] The impact of the availability of benefits increased as a result of this Court's decision in *California Dep't of Human Resources Dev.* v. *Java,* 402 U.S. 121 (1971), which removed as an impediment to the payment of benefits an employer's appeal from an initial determination that benefits are "due".

[7] HAWTEL is not a Bell System company. Its negotiations concerned a new agreement covering all employees in a state-wide bargaining unit.

unemployment compensation which, according to the union leadership, the employees expected to receive (8a, 9a). Not only would these benefits have provided many of the strikers with over 70 percent of their normal take home pay (31a, n.37), but HAWTEL's reserve account would have been charged, resulting in an additional $754,000 in tax payments during the next two years alone. (33a-34a.)

The trial court found that the availability of such substantial tax-free benefits to strikers at HAWTEL's expense had a clear impact on both the employees and the employer. (33a, 34a) It noted that:

> Defendants' expert, Mr. Ruttenberg, conceded that (1) the existence of a strike fund may be a significant factor in the results of collective bargaining; (2) the existence of a large available source of funds during a strike is used by unions to impress employers that the union has the resources to back up a threat to strike; and (3) the loss of income to strikers is a factor in the minds of strikers when deciding whether to accept an employer's collective bargaining offer. (30a-31a) [footnote omitted.]

From the employer's point of view Hawaii's scheme does more than force an employer to finance a strike against itself. If the employer opposes the strikers' claims, the litigation process requires the disclosure of detailed operating information which would be useful to the union in future strikes; moreover, employer opposition to the claims may also impede efforts at restoring employee relations after a strike. In effect, then, the only way an employer can avoid financing a strike against itself is to endure a substantial "stoppage of work", foregoing its federal right to keep its business operating.[8] *NLRB* v. *Mackay Co.*, 304 U.S. 333, 345 (1938). Thus, while federal law recognizes the right of the employer to operate, Hawaii, in effect, levies taxes upon the exercise of this right and pays the proceeds to the strikers. The result is a direct transfer of economic resources from struck employer to striker.



As summarized by the District Court:

> Under Hawaii's law, when the avowed objective of closing down the employers plant is achieved by the union, no benefits may be paid the strikers. The state is then neutral. When, however, the employer is successful in resisting the union attack, and keeps his business in substantially full operation, the state, after the first week of the strike, takes sides against the employer, and for the strikers. As indicated, it sets about giving great financial assistance to the strikers, and extracting valuable (to the strikers) financial and other information, as well as burdening the employer with future increased tax burdens. The strikers' position when a strike is called, with the state's assist, becomes one of "heads I win, tails you lose!" (53a.)

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[8] Need is not a factor in eligibility for benefits. The degree of curtailment necessary to result in striker disqualification varies in other states. *See generally*, 61 A.L.R.3d 693 (1975).

## REASONS FOR GRANTING THE WRIT

### I.

### The Existence of a Conflict Between the Courts of Appeals for the First and Second Circuits Is Before the Court, Warranting a Grant of Certiorari Before Judgment in This Case.

While the instant case awaits the scheduling of oral argument in the Court of Appeals, a petition for writ of certiorari has this date been filed in *New York Telephone Company* v. *New York State Department of Labor, supra,* Docket No. 77-961.

The opinion in *New York Telephone* rests solely upon an inference that Congress has impliedly condoned state intrusion upon the core of federal labor policy where such intrusion is accomplished through an unemployment insurance statute. That decision, therefore, stands in direct conflict with the First Circuit's opinion in *Grinnell Corp.* v. *Hackett,* 475 F. 2d 449 (1973), *cert. denied,* 414 U.S. 858, 879 (1973). *Grinnell* set forth a framework for judicial analysis of the precise issues presented here. Essential to that analysis is the First Circuit's holding that "unambiguous Congressional intent is lacking", *id.* at 457, necessitating 1) a close examination of the nature of the infringement upon federal labor policy and 2) an evaluation of whether state and federal interests involved are *closely* balanced. Only where such a close balance exists would the First Circuit consider a history of Congressional awareness and inaction indicative of a lack of preemption. *Id.* In the present case, the District Court followed a similar analysis.



The conflict created by the Second Circuit in *New York Tel.* thus goes to the threshold issue in *Hawaiian Telephone.* By finding that Congressional intent was *not* ambiguous, the Second Circuit, in effect, holds that a detailed inquiry into the nature of the state's intrusion is irrelevant. Regardless of how badly a state mutilates the federal labor policy, such action in the Second Circuit's view, enjoys implied Congressional approval if done in the name of unemployment compensation.[9]

Clearly, the Ninth Circuit is faced with a conflict which can only be resolved by this Court.

This Court has considered the granting of certiorari before judgment in the Court of Appeals, particularly appropriate where injunctive relief has been granted in one circuit and denied on a related issue in another circuit. *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10, 12 (1963). Moreover, certiorari before judgment has been deemed appropriate where a case presenting a similar or related issue is before the Court, particularly when the issues raised, as is the case here, are of national significance. *New Haven Inclusion Cases,* 399 U.S. 392, 418 (1970); *Brown* v. *Board of Education,* 344 U.S. 1, 93 (1952). This process gives the Court an appropriate opportunity to

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[9] *See United States* v. *United Continental Tuna Corp.,* 425 U.S. 164 (1976). *Morton* v. *Mancari,* 417 U.S. 535, 550 (1974). This Court has long recognized that labor law preemption cases deal with "the domain of government and practical affairs." *Hill* v. *Florida,* 325 U.S. 538, 553 (1945). In such matters the Court has examined the detailed effects of state action on the federal collective bargaining scheme before it has drawn conclusions as to the existence of impermissible state actions, and has avoided reaching conclusions through the Delphic process of interpreting legislative history from the remarks of individual Congressmen.

resolve "arguments . . . [which] are necessarily identical." *Roe* v. *Wade*, 410 U.S. 113, 123 (1973).

Simultaneous consideration of these two cases is further warranted because their meticulously detailed factual records demonstrate the destructive influence which unemployment compensation for strikers has on the federal labor policy of neutrality. The record in each case demonstrates that, whether in New York or in Hawaii, such state influence inevitably and significantly tips the scales in favor of unions and against employers, and impedes the free play of economic forces necessary to resolve labor disputes through collective bargaining. *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960) The Second Circuit invites every other state, through the same sort of judicial manipulation of statutory language, to inflict its own damage upon federal policy, uninhibited by concerns for the impact and infringement thereupon, and unrestrained by the bounds of legitimate state interests.

The large number of *amici* to the Second Circuit in *New York Tel.* and the intervention of the unions in *Hawaiian Telephone* indicate these two cases vitally concern unions as well as employers throughout the nation.[10] Moreover, by granting certiorari in *Hawaiian Telephone* at this time organized labor, as well as the Chamber of Commerce of the United States, would be afforded an opportunity to participate as parties in the resolution of these important issues.

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[10] Of such national significance are these issues that the Commonwealth of Pennsylvania filed a brief as *amicus curiae* in *Hawaiian Telephone*.



The sole question presented for resolution by the AFL-CIO to the Ninth Circuit, is a variant of the pivotal question in *New York Telephone, supra, i.e.* "Did Congress determine to permit states to pay unemployment insurance benefits to strikers if they so choose?"[11] Since the conflict between the First and Second Circuits involves essentially the same issue and merits resolution by this Court, Petitioners should be afforded full participation when that conflict is resolved.

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[11] The State of Hawaii presented the following issues to the Ninth Circuit:

1. Has Congress explicitly or implicitly ruled out the payment of unemployment compensation benefits to strikers?

2. If an expression of congressional intent to rule out such payment is lacking, has Congress been aware that benefits have been and are being made available to strikers under state unemployment compensation laws and have there been opportunities for Congress to act thereon if it desired?

3. Have plaintiffs demonstrated that the payment of unemployment compensation benefits to strikers in the limited situations where such payment is authorized under the labor dispute disqualification provisions of the Hawaii Employment Security Law frustrates the federal collective bargaining policy or that the payment has a substantial impact on the policy?

4. If a "substantial impact" or "palpable infringement" has been shown, have plaintiffs further demonstrated that the federal interest in untrammeled collective bargaining outweighs the State of Hawaii's interest in its economic health and in the well-being of its citizens?

## II.

**Hawaii's Policy of Assistance to Strikers Through Unemployment Compensation Is Preempted by the National Labor Policy as Embodied in the National Labor Relations Act.**

The National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.* (NLRA), is a comprehensive regulatory code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce. *Nash* v. *Florida Indus. Comm'n,* 389 U.S. 235, 238 (1967). Free and unfettered collective bargaining is the process chosen by Congress to promote economic stability and minimize industrial strife. *Teamsters Local 24* v. *Oliver,* 358 U.S. 283, 295-296 (1959). The use of economic sanctions is at the core of this federal scheme, *NLRB* v. *Insurance Agents Int'l Union,* 361 U.S. 477 (1960), leaving "the results of the contest to the bargaining strengths of the parties." *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99, 108 (1970). "The degree of economic power the parties possess, rather than the Government, controls the results of negotiations," *Insurance Agents,* 361 U.S. at 488, 489.

Consistent with these principles, this Court has guarded the process of collective bargaining from improper state interference that tips the scales toward management or labor. See *Oliver, supra; Teamsters Local 20* v. *Morton,* 377 U.S. 252 (1964); *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees* v. *Missouri,* 374 U.S. 74 (1963).

This Court has noted that the obligation to pay compensation is potent means of governing conduct and controlling



policy. *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 249 (1959). Hawaii virtually requires employers who maintain substantial operations in the face of a strike to compensate strikers, although the employer's conduct is clearly an exercise of a long recognized right under federal labor law to continue operations. *NLRB* v. *Mackay Co.,* 304 U.S. 333, 345 (1938).

Hawaii's policy, therefore, directly and irreconcilably intrudes into the federal process of collective bargaining Congressionally designed to be free from state interference. *Oliver, supra; Morton, supra.* Such obvious conflict, "actual or potential," should lead to easy judicial exclusion of state action. *Garner* v. *Teamsters,* 346 U.S. 485, 488 (1953); *Garmon, supra,* at 240.

Still, this issue remains unresolved by this Court which, in *Ohio Bureau of Employment Services* v. *Hodory,* 45 U.S.L.W. 4544, 4545 n.3 (U.S. May 31, 1977) (No. 75-1707), expressly reserved the instant question of labor law preemption.[12] What is at stake here is not whether the states have latitude to act in an area of peripheral concern touching

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[12] *See also Batterton* v. *Francis,* 45 U.S.L.W. 4768, 4770 n.7 (U.S. June 21, 1977) (No. 75-1181). In *New York Tel.,* 96 L.R.R.M. at 292, —— n.2, the Second Circuit rejected the contention that this issue had been disposed of in *Kimbell, Inc.* v. *Employment Security Comm'n,* 429 U.S. 804 (1976). The instant case differs significantly from *Kimbell,* in which the record did not disclose whether the employers were subject to the NLRA. From the Jurisdictional Statement, p. 5, therein, it appears the claimants were locked out. Unlike Hawaii, New Mexico had no fixed policy in advance of the strike. Contrary to the facts in *Hawaiian Telephone,* it appears that striker-claimants in New Mexico must be available for work and must register for work. Moreover, the only issue there presented was the narrow question of post-strike payments. The impact of benefit availability was never litigated therein. *See Kimbell* Jurisdictional Statement, pp. 8, 9. Indeed, the federal preemption issue was mentioned only

labor disputes (such as that at issue in *Hodory*),[13] but whether the conferring of a benefit upon strikers at the expense of the struck employer is an *improper* accommodation to the special interests of strikers and unions which directly alters the economic equation in collective bargaining. *See* Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337, 1356 (1972). In Hawaii, as in New York, the state adds to the employer's obligations by rewarding strikers for holding out and penalizes the employer for failing to capitulate before unemployment benefits become due. *See Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n,* 427 U.S. 132, 147 (1977); *id.* at 156 n.* (concurring opinion of Mr. Justice Powell and the Chief Justice).

Petitioners herein agree with the contentions of the petitioners for a writ of certiorari in *New York Tel.,* Docket No. 77-961, filed January 4, 1978. However, we further submit that the practical consequences of allowing that decision to stand warrant granting certiorari in both that case and this one.

The practical effect of the outcome of these cases upon all employers subject to the federal labor policy is immense. See 26a, 33a-34a. The future implications of allowing this abuse, which is now enjoined by the order of the District Court, to be resumed far exceed the substantial drain on the employer-financed unemployment insurance fund which

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briefly—and then only in a footnote in another case which the New Mexico Supreme Court cited as the sole basis for its decision where it *distinguished* the case from *Hawaiian Telephone. Albuquerque-Phoenix Express, Inc.* v. *Employment Security Comm'n,* 88 N.M. 596, 554 P.2d 1161, 1165 n.1 (1975).

[13] The claimant there was not a striker.



would result if HAWTEL's strikers are paid. Other major employers in twenty-five or more other states which have a "stoppage of work" statute, share the concern that their states will have the power to force them to finance strikes against themselves as the price for operating during a strike. *See generally,* 61 A.L.R. 3d 693 (1975); *U.S. Dep't of Labor Comparison of State Unemployment Insurance Laws* (1972); Carney, *A Study of Subsidies for Strikers,* 1973 Wash. U. L. Rev. 469.

Since 1968 employers in such diverse industries as communications and electric utilities, aerospace contracting, warehousing and distribution, printing, hotel and resort operations and health care have been confronted with claims for unemployment compensation for strikers. Several struck employers have had to invoke the jurisdiction of Federal courts to prevent the state's payment of benefits. *Hawaii Employers Council* v. *State of Hawaii Dep't of Labor & Indus. Rel. (Pearl Harbor Fed. Credit Union),* Civil No. 74-262; *Mail-Well Envelope Co.* v. *State of Hawaii Dep't of Labor & Indus. Rel.,* Civil No. 75-131; *Hawaii Employers Council* v. *State of Hawaii Dep't of Labor & Indus. Rel. (Edward D. Sultan Co.),* Civil No. 74-285; *Ford Aerospace & Communications Corp.* v. *State of Hawaii Dep't of Labor & Indus. Rel.,* Civil No. 75-44. Such action is necessary even where the strike involved was illegal. *Misc. Service Workers Local 427 (Edward D. Sultan Co.),* 223 N.L.R.B. No. 202 (1976). Indeed, many employers, particularly utilities, energy suppliers, and health care facilities provide services which cannot be stockpiled or deferred. Such employers cannot "shut down" without drastic effects on the public. They are particularly hard hit by the imbalance created by the states' intrusion on behalf of unions at the employers' expense.

We submit that Congress never intended, and has never condoned, a system of collective bargaining which has at its core an employer's obligation to finance strikes which fail either to shut down the employer or to force its capitulation, whether the financial aid flows after one week or eight weeks of a strike. Strikers have not lost their jobs. They are not involuntarily "unemployed." They are engaged in economic combat.[14]

## III.

### The Fully Developed Record in Hawaiian Telephone Will Assist the Court in Resolving the Issues Presented in New York Telephone.

The District Court's decisions in *Hawaiian Telephone* reflect the degree to which the record below traces the impact of the availability of benefits upon the labor leaders, employers and indeed upon employees, who are all aware of the state's fixed scheme. Beyond providing statistical analysis, the record demonstrates precisely how the state's mechanism operates to raise striker morale, increases their willingness and ability to hold out, leads employers to raise their own offers and ultimately either prolongs strikes or causes higher and more inflationary settlements.[15] An

[14] Indeed, it is ironic that the testimony of union officials from Hawaii reveals that, in general, Hawaii unions do not have the traditional source of striker support, a strike fund!

[15] These two cases (*New York Tel.* and *Hawaiian Telephone*) are, to petitioners' knowledge, the only two cases which have been fully tried and decided by the federal courts dealing specifically with the issues presented herein. Both cases were tried in the light of this Court's opinion in *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 124 (1974) (involving payment of welfare benefits to strikers) and of the analytical framework mandated by the First Circuit in *Grinnell, supra* (involving payment of unemployment compensation to strikers).



examination of this detailed record would be useful in enabling the Court to decide whether the balance Congress struck among " . . . protection, prohibition, and laissez faire in respect to union organization, collective bargaining, and labor disputes . . . would be upset" if a state can enforce rules of decision under unemployment insurance laws which nevertheless rest "upon its views concerning accommodation of the same interests." Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352 (1972).

If the collective bargaining process is to function, the threat of economic warfare with attendant loss must operate freely to encourage concessions on *both* sides. By examining the record herein, as did the District Court (23a-34a), this Court will be able to evaluate Hawaii's assistance to strikers in labor disputes, which turns not upon need or any related interests of the state, but upon the very play of economic forces which Congress has ordained shall operate free from state manipulation. *Lodge 76, IAM, supra.*

The Court will be able to trace the course of the award of $100,000 of benefits for Hawaiian Electric strikers, followed by the HAWTEL Telephone strike vote, the union's urging of strikers to file for expected benefits and the subsequent rejections of management's offer. The prolonged strike ended shortly after the state's public recognition of management's right to oppose the claims. (8a, 27a)

The record further demonstrates that just after the strike ended and this action was filed, a top union official publicly admitted, with respect to the claimed benefits for HAWTEL strikers, that the union had notified its members that they could expect benefits and that a "lot of the workers have already spent the money without actually getting it." Later, employees and representatives of various unions publicly contended that the withholding of unemployment benefits from strikers would interfere with the right to strike. A review of such evidence is essential to determine how seriously both Hawaii and New York intrude into areas designed by Congress to be free from state interference.

In short, the record herein is the product of the "process of litigating elucidation," *IAM* v. *Gonzales,* 356 U.S. 617 (1958), necessary to permit "a more complicated and perceptive process than is conveyed by the delusive phrase 'ascertaining the intent of the legislature'." *Garmon,* 359 U.S. at 239, 240.



## CONCLUSION

Hawaiian Telephone Company, hundreds of employer members of the Hawaii Employers Council, and thousands of members of the United States Chamber of Commerce are vitally concerned that the Second Circuit decision in *New York Tel.* be reviewed, and ultimately reversed by this Court. Joint Petitioners pray that the Court grant Certiorari in both that case and the instant one to permit prompt resolution of the important national policy issues involved upon the fullest available evidentiary bases while permitting the full participation of all interested parties.

Dated: Honolulu, Hawaii
January 4, 1978

Respectfully submitted,

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# APPENDIX

**Order of Circuit Judges Wright and Anderson**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 76-1584, 76-2056

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HAWAIIAN TELEPHONE COMPANY, a Hawaii Corp.,

*Plaintiff-Appellee,*

and

HAWAII EMPLOYERS COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES, and CHAMBER OF COMMERCE OF HAWAII,

*Plaintiffs-Intervenor,*

v.

STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, ROBERT K. HASEGAWA, THOMAS S. BROWN,

*Defendants,*

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 1357, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 1260, and HAWAII STATE FEDERATION OF LABOR, AFL-CIO,

*Defendants-Intervenor-Appellant.*

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ORDER

Before: WRIGHT and ANDERSON, *Circuit Judges*

*Order of Circuit Judges Wright and Anderson*

Upon due consideration of the motions and oppositions filed by the parties, the court issues the following order:

(a) the motion to strike portions of appellants' motion for summary reversal is denied;

(b) appellees' motion for extension of time to file a response is granted and the response heretofore received is ordered filed;

(c) the motion for summary reversal is referred to the panel which hears these appeals on their merits; and

(d) appellants are granted an extension of 14 days from the date of this order in which to file briefs.

EUGENE A. WRIGHT

G. BLAINE ANDERSON
*U.S. Circuit Judges*

Mo Cal 2/7/77



**Opinion Granting Preliminary Injunction**

[378 F. Supp. 791]

UNITED STATES DISTRICT COURT

D. HAWAII

Civ. No. 74-140

July 12, 1974

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HAWAIIAN TELEPHONE COMPANY, Individually and on behalf of all employers engaged in interstate commerce within the State of Hawaii, who are subject to the Hawaii Employment Security Law,

*Plaintiff,*

v.

STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS *et al.*,

*Defendants,*

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 1357,

*Intervenor-Defendant.*

---

Jared H. Jossem, Raymond M. Torkildson, Torkildson, Katz & Conahan, Honolulu, Hawaii, for plaintiff.

George Pai, Atty, Gen., Roy M. Miyamoto, Deputy Atty. Gen., State of Hawaii, for defendants.

James A. King, Edward H. Nakamura, Bouslog & Symonds, Honolulu, Hawaii, for intervenor-defendant.

DECISION

PENCE, *Chief Judge.*

Plaintiff, Hawaiian Telephone Company (TELCO), a public utility, with a state-granted monopoly over telephone communications, seeks injunctive relief against the defendants who operate and direct the State of Hawaii Department of Labor and Industrial Relations (DLIR).

Defendant DLIR, and its director, Hasegawa, with its senior examiner of the Unemployment Insurance Division, Brown, administer HRS Chapter 383, Hawaii's unemployment compensation laws.

By stipulation, IBEW Local 1357 (Union), the union which represents the employees of TELCO, has intervened. Although other sections therefor were alleged, the basis for this court's jurisdiction is under 28 U.S.C. §§ 1331 and 1337.

TELCO is certainly "in commerce" under § 1337 and the question raised is equally certain a federal one under § 1331. The aggregate amount which TELCO would have to pay in to the state's unemployment fund if the state's position is sustained would be over $832,000. If more were needed, as indicated in Almacs, Inc. v. Hackett, 312 F.Supp. 964, [792] 967 (D.R.I.1970): "in equity suits the value to be measured for jurisdictional purposes is the value of the right sought to be protected, here the right to bargain collectively free from state interference, a right which cannot as of this time clearly be valued at less than $10,000."

TELCO allegations satisfy the jurisdictional requirements of both §§ 1331 and 1337. Since TELCO's action is primarily based upon a claim of federal legislative supremacy, a single judge may hear this case.



*Applicable State Law*

HRS Chapter 383-30, Disqualification for Benefits, provides that an individual shall be disqualified for unemployment benefits under "(4) Labor dispute. For any week with respect to which it is found that his unemployment is due to a stoppage of work which exists because of a labor dispute at the . . . establishment . . . at which he is or was last employed."

In Interisland Resorts v. Akahane, 46 Haw. 140, 377 P.2d 715 (1962), the Supreme Court of Hawaii, fundamentally relying upon the fact that Hawaii's Employment Security Law had its origin in the British Unemployment Insurance Acts, of 1911, adopted the British Umpires construction of the term "stoppage of work" as referring "'not to the cessation of the workman's labour, but to a stoppage of the work carried on in the . . . premises at which the workman is employed.'" 46 Haw. at 147, 377 P.2d at 720. *Akahane* was an organizational strike. Immediately after being struck the hotel was able to prevent closing down of hotel operations with the help of supervisors and hotel guests, and within a week had hired replacements for the strikers. The strikers in fact were out of their jobs.

In Gaspro v. Labor & Ind. Rel. Comm'n., 46 Haw. 164, 377 P.2d 932 (1962), in a similar organizational strike, Gaspro was almost completely shut down for about five weeks, *i. e.,* until it hired new employees to permanently replace the strikers. Here, too, the strikers were out of their jobs.

In Meadow Gold Dairies v. Wiig, 50 Haw. 225, 437 P.2d 317 (1968), the Dairies with the assistance of non-bargaining unit members and *temporary* replacements were able

to carry on about 82% of their business. The Unemployment Compensation Appeals Referee, applying *Akahane*, found that there had been no "'substantial curtailment of the business activities at the employer's establishment. . . .'" (50 Haw. at 227, 437 P.2d at 319) and paid unemployment compensation to the strikers.

When employees of the Hawaiian Electric Company, a public utility, struck in February of 1974, because Hawaiian Electric continued to generate and sell electricity during the strike, they were deemed not to be disqualified. The Department of Labor paid unemployment benefits in excess of $100,000 to the striking employees.

Unemployment benefits are paid out of a state fund which is maintained in part by payroll taxes levied against the employers. Subject to a limitation that the employer's tax cannot exceed 3% of the annual payroll, the state law permits an employer's favorable experience to give him a lower tax. For example, TELCO's taxes for 1974 were but 1.6% of annual payroll. In the event that unemployment benefits are paid to its striking employees, those benefits will then be charged against the employer's account and increase its tax rate and contribution.

*Findings of Fact*

TELCO is an employer engaged in interstate commerce subject to the jurisdiction of the NLRB, the Federal Social Security Act, and the Hawaii Revised Statutes, Chapter 383, the Employment Security Law, and related rules, insofar as unemployment benefits thereunder may be provided to employees on strike.

On April 30, 1974, the collective bargaining agreements between TELCO and the Union, for the TELCO employees



represented by it, terminated. One week later, on May 7, [793] some 3,300 employees of TELCO struck TELCO, left their jobs, and established picket lines at the employer's various places of business in Hawaii.

The Union's first strike bulletin, issued on the very day of the strike, stated among other messages:

> "Your shop steward will . . . be able to answer basic questions about unemployment compensation . . . ."

On May 8, the second day of the strike, an article appeared in the Honolulu Star-Bulletin, an evening newspaper, with the largest circulation, entitled "Strikers Can Qualify for Jobless Pay." On that same day, the Department of Labor posted an 18" x 30" sign on the glass front of its Unemployment Insurance Division, stating:

> "Hawaiian Telephone Strikers
> Contact your Union to File
> Your Claim"

On Kauai the Union chairman set up a Saturday, May 11, meeting with state officials to assist the Union in filling out "mass applications" for unemployment benefits. Before that Saturday, the Union was provided with mass claim sheets for unemployment compensation by the State Department of Labor. The May 11, 1974 Union strike bulletin said:

> "Our crews are hard at work gathering information and completing forms for unemployment compensation. If you have not applied, contact your picket captain immediately and he or she will make arrangements for

you to meet with one of our union members assigned to processing unemployment compensation applications."

During the strike over 3,000 employees who were not working because of the labor dispute signed or had their names placed on the mass claim sheets. Also during the strike the Union, through its officers and members, advised its employees regarding the procedures for filing claims for state unemployment benefits and filed the mass claim applications at the Union's office in Honolulu. Substantially all the claims for benefits filed with the DLIR were filed by the Union via the mass claim sheets.

On May 28, 1974, the striking members voted to reject a company proposal and it was not until June 13, 1974 that a second company proposal was accepted. TELCO's striking employees began to return to work on June 14, 1974. The strike had lasted thirty-eight (38) days.

At a meeting at the Honolulu office of the DLIR on June 17, 1974, defendant Brown, senior examiner of the DLIR, scheduled an informal predetermination hearing for June 27, at which TELCO and the Union were to supply data to enable Brown to determine, with respect to the TELCO strikers, solely whether they were disqualified for unemployment benefits because their "unemployment is due to a stoppage of work which exists because of a labor dispute at the . . . establishment . . . at which he is . . . employed." HRS Chapter 383-30(4). The only issue before Brown would have been whether a "stoppage of work"[1]

[1] As that phrase had been interpreted and applied by the state in ***Akahane, supra,*** and expanded in ***Gaspro, supra,*** and ***Meadow Gold, supra.***



can be established by TELCO. Unless TELCO were to be able to convince Brown that it had experienced a "substantial curtailment of operations" during the strike, the strikers would be paid unemployment compensation for all strike lost time, save the first seven days. Thereafter in accordance with the provisions of the state act, TELCO would be forced to replenish the state's unemployment compensation fund by paying therein some $832,000.

After the instant complaint was filed, the Pacific Business News of June 20, 1974 reported that John Guzman, business manager of the Union, stated for publication that the Union had notified its members that they could expect to receive unemployment benefits for the period of the strike and that "a lot of the workers have already spent the money without actually getting it and this is worrying

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our people." Moreover, Guzman was reported as saying that TELCO's opposition to the payment of unemployment benefits manifested an anti-union attitude on the part of TELCO. The Union has not denied these reports.

Although the strike has ended, TELCO and the Union still have a collective bargaining agreement, but TELCO, by state law, is nevertheless still forced into the position of litigating before the DLIR the question of whether its employees who struck should be entitled to receive unemployment compensation benefits. If the benefits are paid they would be charged against TELCO's account, thus forcing TELCO to pay some $832,000 in additional unemployment tax contributions, during 1975. The position of the DLIR is that if the information requested of TELCO did not show a "stoppage of work" as interpreted by the Hawaii decisions, *supra,* and the strikers were otherwise eligible,

they would be paid unemployment benefits for the four weeks and three days of the strike remaining after the first excluded week.

*Legal Issues*

The underlying question is whether Hawaii's DLIR is wrongfully intruding in a labor dispute by making available unemployment benefits to strikers who would qualify therefor under the Hawaii Unemployment Compensation laws. The problem is whether such state action as has been heretofore taken in *Meadow Gold* and Hawaiian Electric alters the relative economic strength of Union vs. employer and thus enters the field preempted by the national policy guaranteeing free collective bargaining, in violation of the Supremacy Clause of the Constitution. Although the strike is ended, the problem is certainly not moot inasmuch as the state proposes to proceed with its hearings to determine whether or not TELCO's operations and revenues were substantially disturbed by the strike and whether or not the strikers are entitled to unemployment compensation.

Although there is no certain evidence as to the extent which the hope of receipt of unemployment compensation by the strikers affected the continuation of the strike, nevertheless from the activities of the Union in assisting in mass applications for benefits as well as the Union's characterization of TELCO's opposition to payment of unemployment benefits as manifesting "an anti-union attitude on the part of TELCO", strong inferences could be drawn that the Union at least felt that the receipt of unemployment compensation was of considerable importance in its arsenal of strike weapons.



None of the striking employees has as yet been actually determined to qualify for unemployment benefits because (a) there has as yet been no determination that TELCO's business has been substantially curtailed, i. e., that TELCO had 20% or more decline in revenue (which was indicated as a possibly relevant base in *Meadow Gold*), nor (b) has there been any actual processing of the strikers' applications to see if any has a per se disqualification under the state act. Assuming, however, that TELCO cannot show that its net revenue was substantially disturbed, then it is clear that almost if not all of the strikers would qualify for unemployment benefits. It therefore follows that the issue of irreparable harm arises because the prospective provision of economic aid to the strikers with a concomitant tax penalty upon the employer could be held to impermissibly and adversely affect the collective bargaining process.

*Legal Analysis*

It is now well settled that state laws may not be used to restrict activities protected by either § 7 or § 8 of the NLRA, 29 U.S.C. §§ 157, 158.[2] The instant problem, however, is one which does not arise out of activities specifically protected or proscribed under those two sections. Hawaii's unemployment laws, like those of the other states, were fostered by the national unemployment insurance

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[2] *See* Garner v. Teamsters Local 776, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953); Building Trades Council v. Kinard Construction Co., 346 U.S. 933, 74 S.Ct. 373, 98 L.Ed. 423 (1954); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Teamsters Local 20 v. Morton, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964).

legislative policy of the 1930's and were enacted following The Depression. All of the then 48 states enacted such laws in 1936 and 1937. Hawaii's Act was passed in 1939. There was no question that the states intended to be "neutral" in labor disputes.[3]

The notion of state neutrality ignores the realities of state and national governmental intervention in labor relations by means of minimum wage laws, workmen's compensation, the Wagner Act and the Taft-Hartley Act. The federal as well as the state legislative purpose for unemployment pay is "to provide real security against the hazard of unemployment—the weekly benefits should be sufficient to cover the basic necessities of most claimants and their families without requiring them to resort to relief . . . ."[4] The definition of an unemployed individual in most of the state laws does not distinguish between the individual who is totally unemployed and without wages, the one who has no regular job, but picks up some work and earnings, and the individual who has not been separated from his regular employment but has had his hours cut and his wages substantially reduced.[5]

As pointed out by Archibald Cox in his Harvard Law Review article on "Labor Law Preemption Revisited":[6]

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[3] As noted by Shadur in his article on "Unemployment Benefits and the 'Labor Dispute' ", U.Chi.L.Rev. 294, 296 (1949-50), this view of "neutrality" is notable at least for its age, having been a basis in the 1911 British Act.

[4] Unemployment Insurance Legislative Policy—Recommendations for State Legislation—1962, U. S. Department of Labor, Bureau of Employment Security, No. U-212, at 10.

[5] *Id.* at 9.

[6] 85 Harv.L.Rev. 7, 1352-53 (1972).



> "An appreciation of the true character of the national labor policy expressed in the NLRA and LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests."

The basic and ultimate problem before this court is to determine whether or not Hawaii's own Unemployment Compensation Act as interpreted, interferes with the working out of the national policy of encouraging self-organization and collective bargaining without state interference in the use of the economic weapons available to both labor and management.

The factual situation found in both *Akahane* and *Gaspro* is not involved here. Each of those cases arose out of an organizational strike. Within a relatively short time in each case the strikers had lost their jobs—permanently. The same was not true in *Meadow Gold,* and, as here also, the strikers knew that sooner or later they would return to *their* old jobs. Their unemployment was temporary and self-induced.

Times have changed since the 1930's and 1940's and 1950's when the big employers had massive economic muscle, and fractionated unions had little. Today a company union or a purely local union, as a practical matter, no longer exists. Local units are almost uniformly but a segment of a nation-wide union. One no longer talks of

the giant employers—it is of the giant unions, the IBEW, ILWU, UAW, Teamsters, AFL-CIO. In this local case the IBEW had over 3,300 members out on strike against TELCO.

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As in Allen-Bradley v. Board, 315 U.S. 740, 62 S.Ct. 820, 86 L. Ed. 1154 (1942), in the context of this case it is not necessary to treat Hawaii's Unemployment Compensation Act as an inseparable whole. Here the focus is on only one narrow segment of that Act and its interpretation by Hawaii's courts. The sole question is whether the stoppage of work section, *supra,* as Hawaii has actually treated it, conflicts with the NLRA. Certainly the NLRA was not *designed* to preclude a state from giving aid to a striker who had actually lost his job, as in Lawrence Baking Co. v. Michigan City, 308 Mich. 198, 13 N.W.2d 260 (1944), and in *Akahane* and *Gaspro.* Here, however, TELCO strikers' jobs were not at all terminated; employment was only suspended for the duration of the strike. Both management and Union and its striking members knew that resumption of employment upon the end of the strike would follow "as the day the night."

As said by Justice Frankfurter in dissent in Hill v. Florida, 325 U.S. 538, 552, 65 S.Ct. 1373, 1380, 89 L.Ed. 1782 (1945), in this state-federal conflict "we are in the domain of government and practical affairs" and state action may not be stifled "unless what the State has required, in the light of what Congress has ordered, would truly entail contradictory duties or make actual, not argumentative, inroads on what Congress has commanded or forbidden."



It is in the context of today's realities and "practical affairs" in labor-management collective bargaining which, as this court sees it, has brought out The Court's opinion in Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974). There, employers whose plants were struck, brought suit for injunctive and declaratory relief against New Jersey's state policy of holding workers engaged in an economic strike as eligible for public assistance through its welfare program. The employers claimed that the regulations according benefits to striking workers were invalid because they interfered with the federal labor policy of free collective bargaining expressed in the Labor Management Relations Act. Prior thereto, the district court, following the "well-settled law" set forth in ITT Lamp Division v. Minter, 435 F.2d 989 (1st Cir.), cert. denied, 402 U.S. 933, 91 S.Ct. 1526, 28 L.Ed.2d 868 (1971), ruled that the appropriate forum for the problem was Congress and that the New Jersey practice of giving aid to striking workers did not violate the Supremacy Clause. The complaint was then dismissed. On appeal, the court did not reach the merits but remanded the case with instructions to vacate and dismiss for mootness. 469 F.2d 911, 922 (3rd Cir. 1972).

To the surprise certainly of this court, the court stated:

> ". . . New Jersey has declared positively that able-bodied striking workers who are engaged, individually and collectively, in an economic dispute with their employer are eligible for economic benefits. This policy is fixed and definite. It is not contingent upon executive discretion. Employees know that if they go out on strike, public funds are available. The petitioners'

claim is that this eligibility affects the collective-bargaining relationship, both in the context of a live labor dispute when a collective-bargaining agreement is in process of formulation, *and* in the ongoing collective relationship, so that the economic balance between labor and management, carefully formulated and preserved by Congress in the federal labor statutes, is altered by the State's beneficent policy toward strikers. It *cannot be doubted* [emphasis added] that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly, has ruled out such

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assistance in its calculus of laws regulating labor-management disputes. In this sense petitioners allege a colorable claim of injury from an extant and fixed policy directive of the State of New Jersey. That claim deserves a hearing." *Super Tire,* 416 U.S. 115, 94 S.Ct. 1694, 1699, 40 L.Ed.2d 1 (Footnote omitted.)

What The Court found concerning the pervasive effect of the availability of state welfare assistance during strike-induced work stoppages upon collective bargaining agreements and incipient labor contracts in New Jersey have in this TELCO case been shown as having equal or greater effect. As indicated heretofore, the labor leaders themselves instantly assisted all strikers in filing applications for unemployment compensation and, when this present



action was started, condemned TELCO's action as manifesting an anti-union attitude.

Hawaii's requirements here gave to the strikers the expectation of receiving (after the first week) about $280,000 per week for each week the strike continued. TELCO on the other hand was faced with the problem of trying to keep its own business operations from completely collapsing, knowing that if the operations were not ultimately found to have been substantially curtailed, i.e., cut by at least 20%, they would have to pay (after the first week) about $190,000 per week in unemployment tax contributions for each week of the strike. Moreover, such tax "contribution" payments, even if ultimately refunded by the state would be returned *without interest*![7]

*Conclusions of Law*

It is in the above "domain of government and practical affairs" that this court must rule upon TELCO's present request for a preliminary injunction.

From the preceding facts and analysis, it appears to this court that, in dollars and cents, TELCO will instantly be faced with the costs of presenting its case to the DLIR on the quantum of business injury it suffered during the strike. From the actions of the DLIR from the outset of the strike, as well as from its February Hawaiian Electric ruling, TELCO has reasonable grounds to believe that the DLIR will find that its operations were not "substantially" impaired and it will be ordered to "contribute" some $832,000 into the state's unemployment fund—with no certainty

[7] HRS Chapter 383-76.

that that money will be returned (without interest) via rate increase or otherwise.[8]

Guzman's statements to the press clearly show the solid impact of TELCO's present challenge of the state act upon TELCO's labor-management relations.

This court finds that TELCO's showing of threat of irreparable harm, if the requested preliminary restraint is not granted, is sufficient to comply with the first of the four factors involved in preliminary injunction proceedings set forth in King v. Saddleback Junior College, 425 F.2d 426 (9th Cir. 1970), cert. denied, 404 U.S. 979, 92 S.Ct. 342, 30 L.Ed.2d 294 (1971).

As to the second factor, this court finds that the impact of a temporary restraint upon the state in its processing of the strikers' claims and determining TELCO's liability will be almost nil. While the strikers themselves undoubtedly could use the anticipated unemployment compensation,

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there has developed no inference that any are now on welfare. All have been regularly employed since June 13 (at higher pay), and all may reasonably expect that such employment will certainly continue.

This court's analysis of the legal inferences to be drawn from *Super Tire,* in the context of what would appear to

[8] The state's argument that TELCO can suffer no monetary harm because it may charge off increased payments against the rate-making scheme and may get an increase in rates, borders on the frivolous. Not only does TELCO not have any *absolute* assurance that it will be able to so pass on such *expenses* to the public, but the argument bypasses the basic *legal* problem posed and the effect of the decision in this case on employer who, not having a state-controlled monopoly, must operate under America's free and harshly competitive economic scheme.



have been a weaker case than that of TELCO's, induces this court to find TELCO has demonstrated a reasonable probability of success on the merits and so has satisfied the third factor.

There is no question as to the fourth factor. The Court in *Super Tire* recognized the public interest manifestly involved in labor-management disputes vis-a-vis state assistance to striking workers.

In short, TELCO's case is so closely analogous to *Super Tire* that this court would feel mandated thereby to state, as did The Court, TELCO's "claim deserves a hearing."

*Ruling*

TELCO's prayer for a preliminary injunction is granted.

TELCO's ability to pay in full for any costs and damages that might be suffered by either the state or the Union cannot be questioned. TELCO's bond, therefor, is fixed in the sum of Ten Dollars ($10.00).

TELCO's attorneys will prepare the necessary order.

All counsel will confer, within the next ten (10) days after the filing of the order, upon a schedule for briefing and argument of the underlying question here involved: Whether Congress explicitly or implicitly has ruled out Hawaii's statutory scheme of unemployment assistance in its federal calculus of laws regulating labor-management disputes. A hearing on such scheduling will be held on Friday, July 26, 1974, at 9:00 a. m.

**Declaratory Judgment and Order**

**Nov. 17, 1975**

**As Amended Feb. 9, 1976**

[405 F. Supp. 275]

UNITED STATES DISTRICT COURT

D. Hawaii

Civ. No. 74-140

Oct. 14, 1975

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Hawaiian Telephone Company, a Hawaii Corporation,
*Plaintiff,*

and

Hawaii Employers Council, Chamber of Commerce of the United States, and Chamber of Commerce of Hawaii,
*Intervenor-Plaintiffs,*

v.

State of Hawaii Department of Labor and Industrial Relations *et al.*,
*Defendants,*

and

International Brotherhood of Electrical Workers, AFL-CIO Local 1357, *et al.*,
*Intervenor-Defendants.*

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*Declaratory Judgment and Order*

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Jared H. Jossem, R. M. Torkildson, Torkildson, Katz & Conahan, Honolulu, Hawaii, for plaintiff and intervenor-plaintiff Hawaii Employers Council; Lawrence M. Cohen, Lederer, Fox & Grove, Chicago, Ill., for intervenor-plaintiff Hawaii Employers Council.

Edward Jaffe, Cades Schutte Fleming & Wright, Honolulu, Hawaii, and Gerard C. Smetana, Borovsky, Smetana, Ehrlich & Kronenberg, Washington, D.C., for intervenor-plaintiffs Chamber of Commerce of the U.S. and Chamber of Commerce of Hawaii.

Ronald Y. Amemiya, Atty. Gen., of Hawaii, Frank Yap, Jr., Deputy Atty. Gen., Honolulu, Hawaii, for defendants.

Edward H. Nakamura, James A. King, Bouslog & Symonds, Honolulu, Hawaii, for intervenor-defendant IBEW, Local 1357.

Benjamin C. Sigal, Shim, Sigal & Tam, Honolulu, Hawaii, for intervenor-defendant IBEW, Local 1260, and Hawaii State Federation of Labor.

Decision

Pence, *District Judge.*

Plaintiff Hawaiian Telephone Company (TELCO) alleges that the potential payment of unemployment compensation to TELCO strikers by the State of Hawaii Department of Labor and Industrial Relations (DLIR) impermissibly infringes upon and interferes with TELCO's rights to engage in free collective bargaining, a field of activity preempted by Congressional regulation. This court granted a preliminary injunction against the DLIR in a previous

decision on the same case. *See Hawaiian Telephone Company v. State of Hawaii,* 378 F. Supp. 791 (D.Haw.1974). The jurisdictional basis, applicable state law, preliminary [277] findings of fact[1] and legal analysis set forth in that decision are incorporated in this decision without repetition here.

Several union and employer organizations have intervened in this action.[2] The "hearing" mandated by *Super Tire Eng. Co. v. McCorkle,* 416 U.S. 115, 124, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974) has been lengthy.

*Evidentiary Issues*

If the First Circuit's observation in *ITT Lamp Division of Int. Telephone & T. Corp. v. Minter,* 435 F.2d 989, 994-95 (1970),

> that welfare programs, supplying unmet subsistence needs to families without time limitation, address a more basic social need than does unemployment compensation, which attempts to cushion the shock of seasonal, cyclical, or technological unemployment by making available time limited benefits to individual workers, varying in relation to their prior earnings and without reference to demonstrated need

[1] Most of this court's preliminary findings were subsequently stipulated by the parties. Pretrial Order, Oct. 1, 1974.

[2] Local 1357, International Brotherhood of Electrical Workers, AFL-CIO, which represents employees of TELCO; Local 1260, IBEW, AFL-CIO, which represents employees at Hawaiian Electric Company; Hawaii State Federation of Labor, AFL-CIO; Hawaii Employers Council, an association serving 650 employers in the field of industrial and labor relations; and the Chambers of Commerce of Hawaii and the United States.



is accepted as true, then, as argued by plaintiffs, it would appear that The Court eliminated the need for a factual inquiry as to whether Hawaii's interpretation and implementation of its unemployment act affects the collective bargaining process, when The Court stated in *Super Tire*:

> The petitioners' claim is that [eligibility for public funds] affects the collective-bargaining relationship, both in the context of a live labor dispute when a collective-bargaining agreement is in process of formulation, *and* in the ongoing collective relationship, so that the economic balance between labor and management, carefully formulated and preserved by Congress in the federal labor statutes, is altered by the State's beneficent policy toward strikers. It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. (416 U.S. at 124, 94 S.Ct. at 1699)

Nevertheless, this court believed and therefore has ruled that an evidentiary hearing would be of assistance in the ultimate resolution of the problem before this court.

## Findings of Fact

*Expert Testimony*

Both plaintiffs and defendants proffered experts on the effect of the payment of unemployment compensation to

strikers. For the plaintiffs, Glenn D. Meyers[3] in essence testified that employee decisionmaking with respect to negotiations and strikes is properly analyzed in cost-benefit terms. The employee compares what he expects to get in the way of settlement with his costs, primarily net lost wages due to striking, taking into account receipt of any outside funds. The defendants' expert conceded that money is a factor in determining behavior.[4]

Meyers examined the economic statistics of the TELCO dispute and determined that "the break-even point for the striker seeking an additional 1% increase would be two [278] weeks without [unemployment] benefits, and about five weeks if benefits are received."[5] His model assumed that the receipt of state benefits affects only the worker's perception of *cost*.

The primary thesis of Stanley H. Ruttenberg, defendants' expert,[6] was that if unemployment compensation were a significant factor in collective bargaining, it would influence wages to be higher or strikes to be longer in those states which provide benefits than in those which do not. If statistics demonstrate the contrary, they prove that unemployment insurance is not a significant factor.[7]

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[3] Dr. Myers is an economic consultant and teacher, specializing in labor economics. Trial transcript [Tr.] Oct. 2-3, at 1-3.

[4] Tr. Dec. 10-17, at 587.

[5] Partial Tr. Oct. 2, at 3-4; Tr. Oct. 2-3, at 136-37.

[6] Mr. Ruttenberg is a labor economist and consultant, former Assistant Secretary of Labor for Manpower, and former economic advisor to Secretary of Labor W. Willard Wirtz. Tr. Dec. 10-17, at 283-86.

[7] *Id.* at 322-23.



The data upon which Ruttenberg based his hypothesis was founded primarily upon the strike experience in Rhode Island and New York, in which unemployment benefits are paid to all strikers after waiting periods of 7 weeks and 8 weeks respectively.[8] He compared this material with statistics for the balance of the United States, and also for 9 large industrial states, and concluded that the availability of unemployment compensation for strikers is not a factor in collective bargaining since strikes were not significantly longer in Rhode Island and New York than elsewhere.[9]

This court could give Ruttenberg's evidence little weight because of the many variables that were involved in the length of strikes, *e. g.*, local union strength or regional economic conditions, *see Grinnell Corp. v. Hackett*, 475 F.2d 449, 459 (1st Cir. 1973), and his control groups include states that pay unemployment benefits to strikers.[10] Moreover, the unemployment scheme for strikers in Rhode Island and New York is so different from Hawaii's as to make his thesis irrelevant. The same general criticism of uncontrolled variables applies to Ruttenberg's wage comparison studies.

Neither expert was of major assistance to the court, although the court believes that Meyers' thesis had a greater degree of validity than Ruttenberg's.

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[8] R.I.G.L. §§ 28-44-14 and -16 (Supp.1971); N.Y.Labor Law §§ 590(9), 592(1) (McKinney 1965).

[9] Tr. Dec. 10-17, at 334, 336-37, 339; Local 1260 Exhibits 3-6.

[10] *E. g.*, Hawaii, and Michigan, *see Dow Chem. Co. v. Taylor*, 57 F.R.D. 105 (E.D.Mich.1972).

*Statistical Findings*

Thirteen out of 272 strikes (4.8%) in Hawaii between 1964 and 1973 resulted in compensation paid to strikers.[11] During that period 16.1% of the total man-days lost due to strikes occurred in strikes in which compensation was paid.[12] In all but one case, unemployment benefits were received after the strike had been settled.[13]

Between 1966 and 1972, the average duration of strikes for which strikers received unemployment compensation was 64.4 days. During the same period, the average length of strikes for which benefits were not paid was 29.9 days.[14] From this relatively narrow base, it would appear that the availability of unemployment compensation does tend to lengthen the duration of strikes in Hawaii.

[279]

*The TELCO Balloting*

The strike began on May 7, 1974. On May 28, 1974, the TELCO employees rejected by a 2-to-1 margin a first tentative agreement that had been reached by the negotiators.[15] Following this rejection, Director of Labor Hasegawa was paraphrased in an article in the Honolulu *Advertiser* on June 1 as stating:

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[11] Local 1260 Exhibits 2, 13 (court's computations). The data unfortunately include all strikes, whether within the national jurisdiction or not.

[12] *Ibid.*

[13] Tr. Dec. 10-17, at 656-58.

[14] Local 1260 Exhibits 2, 13 (court's computations). The latter figure omits all those strikes lasting less than six days, since Hawaii has a one-week waiting period before any benefits are payable.

[15] Pretrial order, Oct. 1, 1974, at 13-14.



> [T]he company has challenged every claim for unemployment compensation—"which they have every right to do."
>
> He said a hearing between the company and union representatives may be held in about two weeks.[16]

On June 5 another tentative agreement was reached and submitted to the membership for balloting by mail. On June 13 this second agreement was approved by more than 3-to-1.[17]

Plaintiffs not implausibly contend that the sudden shift in vote was caused by the company challenge to the payment of unemployment compensation with a concomitant dampening of the employees anticipation of the state's monetary aid.

Raymond Victor, assistant business manager of Local 1357, testified that the shift was due to the shortening of the contract period and that the second ballot was not taken at a mass meeting but by mail.

This court could not find that either theory was necessarily valid.

*The Employer Perspective*

Donald M. Kuyper, Vice President of Personnel for TELCO, testified that the potential availability of unemployment benefits affected his company's offers. As negotiations were about to begin, Kuyper was aware that benefits had just been paid in the Hawaiian Electric Company

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[16] *Id.* at 14-15; Plaintiffs' Exhibit 15.

[17] Pretrial order, Oct. 1, 1974, at 15-16.

strike,[18] and that the potential cost to TELCO as a result of increased payroll taxes, if benefits were paid, was in excess of $100,000.[19] He was under the impression that the union at TELCO had been checking on the availability of welfare and unemployment benefits,[20] and the possibility of strikers getting unemployment benefits was of "major significance . . . going into negotiations." [21]

After the strike had begun, Kuyper observed that the union was actively assisting strikers to file their unemployment claims.[22]

Although Kuyper did not make such a calculation during negotiations, the contribution formulae are readily available for any employer to estimate his increased tax exposure for any length strike for which its employees receive benefits. In TELCO's case, the increase is $754,000,

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[18] Tr. Oct. 1, at 69. Bargaining began just after the award of benefits to Hawaiian Electric Company strikers of approximately $100,000 was announced.

[19] Tr. Oct. 1, at 105. Since Hawaii's unemployment compensation statute bases employer contributions on their experience ratings, *i. e.*, the amount of benefits paid their employees, an employer's decision to keep operating during a strike may lead to an increase in his tax rate. *See* H.R.S. §§ 383-63 to -70 (1968 & Supp. 1974).

[20] Tr. Oct. 1, at 71.

[21] *Id.* at 72: "The closeness of the Electric Company case was certainly in my mind; in addition to that, however, there were other factors that I think were also very relevant. One was that we had come through a recent period of layoffs, there was a great concern for job security. Secondly, there had been a lot of articles in the paper in relationship to the cost of living—the increased cost of living and also, of course, many articles in relationship to the controls coming off, so that those three plus the unemployment benefits were probably the four most significant things that I had in mind as we entered the negotiations."

[22] *Id.* at 73-74, 82-83.



over the two years following the strike.[23] When compared [280]
with the estimated extra $320,000 the initial contract would have cost the company, the magnitude of this tax burden leads to the inescapable inference that there will be occasional instances where it is cheaper for an employer to accede to union demands he otherwise would have rejected, than to run the risk of a prolonged strike.

Bernard T. Eilerts, Executive Vice President of the Hawaii Employers Council during the TELCO strike and at the time of trial, with a background of extensive experience in advising employers and participating directly in bargaining,[24] testified that the potential availability of unemployment insurance is generally considered in determining bargaining strategy.[25]

Eilerts concluded that the potential availability of benefits lengthened the TELCO strike and generally leads to higher settlements where the employer realizes it has to keep operating during a strike.[26]

Neither management witness could quantify the impact of Hawaii's unemployment insurance law on collective bargaining.[27]

The very fact that the employers reasonably perceive the potential or actual availability of benefits as an aid to their bargaining adversary *itself* evidences an effect upon the collective bargaining process.

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[23] Pretrial order, Oct. 1, 1974, App. A (lodged Sept. 18, 1975).

[24] Tr. Oct. 1, at 150, 158, 160-63.

[25] *Id.* at 154, 155-56, 164, 274, 278-79.

[26] *Id.* at 274-75.

[27] *Id.* at 250-52, 275, 299, 339, 341.

The Hawaii "stoppage of work" test requires an inquiry into how much the employer's business was curtailed.[28] This administrative study by the state unemployment division requires exhaustive examinations as to the volume, cash flow, and services affected.[29] In other words, the state seeks to determine how effective the strike has been, which is precisely one of the things a union would be curious to know—as it considers whether to continue the dispute, and what its bargaining position will be. But for the state involvement, TELCO would *not* give this information to the union.[30]

*The Union Perspective*

Employee finances are an important aspect of strike planning because they are key determinants of how long the employees can stay away from work. As a result, many unions in Hawaii send questionnaires to their members to help them analyze their resources in preparation for a potential strike.[31]

Defendants' expert, Mr. Ruttenberg, conceded that (1) the existence of a strike fund may be a significant factor in the results of collective bargaining;[32] (2) the existence of a large available source of funds during a strike is used by unions to impress employers that the union has the

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[28] *See Meadow Gold Dairies v. Wiig*, 50 Haw. 225, 437 P.2d 317 (1968).

[29] Pretrial order, Oct. 1, 1974, at 10.

[30] Tr. Oct. 1, at 83-84.

[31] Tr. Dec. 10-17, at 183, 232, 250.

[32] *Id.* at 465-66.



resources to back up a threat to strike;[33] and (3) the loss of income to strikers is a factor in the minds of strikers when deciding whether to accept an employer's collective bargaining offer.[34] In short, he admitted that a fair summary of his position was that the amount of money a striker is losing "goes through his mind along with other factors and it may have an impact on his decision or does have an impact . . .";[35] and that the source of a striker's funds, whether it be unemployment compensation or union benefits from a strike fund, makes no difference with respect to [281] the impact on the striker's decision.[36]

The benefits potentially available to TELCO strikers constituted a large percentage of their net take-home pay.[37]

Various union officials testified that no thought was given to the availability of unemployment compensation either in preparation for negotiations, during negotiations, or during the course of strikes.[38] However, Local 1357's assistant business manager, Raymond Victor, was asked by a TELCO employee about the possibility of benefits, at a membership meeting a few months before the TELCO

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[33] *Id.* at 467.

[34] *Id.* at 581-83.

[35] *Id.* at 586.

[36] *Id.* at 587. Notwithstanding the foregoing admissions, Ruttenberg maintained in his testimony that funds offsetting wage losses were not important "when the chips are down." *Id.* However, he could not name a single other writer who supports his position, *id.* at 491-95, and could not explain how other well-recognized experts have taken a diametrically contrary position, *see id.* at 487, 647-48.

[37] *See* Pretrial order, Oct. 1, 1974, App. B.

[38] Tr. Dec. 10-17, at 51, 151-52, 155-56, 166, 215-16, 229.

strike. Victor testified that he told the employees "there's no way to determine whether anybody is going to get paid."[39] Then he said he supposed that the employee

> was trying to tell us to get the information before time so that they would know whether they should make up their mind to strike or not . . . .
> . . . I assume he was asking that question to determine whether they should use that as a factor whether they wanted to consider going on a strike.[40]

While certainly not conclusive, a necessary inference to be drawn from his testimony is that at least one union official *believed unemployment benefits to be* a potentially important factor, or thought that some of the membership believed them to be potentially important.[41]

After the TELCO strike was settled and this case was about to come to trial, a leaflet was distributed to TELCO workers bearing the typewritten attribution "Gwen Pascua," a shop steward for Local 1357.[42] The leaflet was a call to rally in protest against the employer's legal action:

> [T]he ink was hardly dry on the contract when the G. T. & E. bosses showed us what they thought of the

[39] *Id.* at 51.

[40] *Id.* at 60-61.

[41] No amount of union disclaimer was capable of convincing all members that "there's no way to determine whether anybody is going to get paid." Some of the membership apparently believed they would be eligible for benefits. Tr. Oct. 1, at 261-62.

[42] *Id.* at 88-91; Plaintiffs' Exhibit 42. Defendants did not dispute that she was the author of the leaflet, nor her position with the intervenor-defendant union, nor that she was acting within the scope of her authority as a steward.



> truce. They sent their fancy lawyers to federal court to sue the State to prevent payment to us of our unemployment compensation, which we were entitled to under State law. By our labor we earned the profits and paid the state taxes that finance the State Unemployment Fund. Now the company, with the help of the courts and their Big Business allies in Hawaii and all over the U.S., is trying to rob us of our benefits, to the tune of hundreds of thousands of dollars, and *trying to undermine our ability and right to strike in the future.*
>
> • • • • •
>
> We must realize that all workers in Hawaii and in 25 other states will be hurt by a bad decision by Judge Pence. Don't we have a responsibility to carry our struggle through, now that the bosses have picked up the club to use against us and all workers, and beat back this attack and *defend our right and ability to strike?* Don't we have a responsibility to the many workers who supported us when we were on strike to
>
> [282]
>
> make sure that our bosses' action in court doesn't *cripple their own strikes in the future?*[43]

Since some union participants believe unemployment compensation to be a potentially important factor, this court cannot conclude that it is entirely extraneous to the collective bargaining process.

*Factual Conclusions*

From the preceding, as well as the facts found in this court's prior decision, this court finds: (1) 16.1% of total

[43] Plaintiffs' Exhibit 42.

man-days lost are attributed to strikes in which compensation was paid; (2) the presence of potential unemployment benefits probably tends to lengthen strikes; (3) the employer's approach to bargaining is affected by the potential additional tax burden; (4) potential increases in tax contributions tend to make employers settle when they otherwise would not; (5) unions are given access to valuable confidential information about the success of strikes during the course of state administrative hearings on benefits; the appealability of those hearings is used as a bargaining chip; (6) employee finances are key determinants of the success of strikes and strike threats; (7) unemployment benefits, if granted, provide a large percentage of striking workers' take-home pay; (8) union members and officials perceive that unemployment benefits contribute to their ability to strike and maintain it. Therefore, this court finds that Hawaii's unemployment insurance statute as interpreted by the Hawaii Supreme Court palpably affected the labor relations between TELCO and the IBEW, and similarly affects all other Hawaii employers and unions in every collective bargaining conflict and "is a factor lurking in the background of every incipient labor contract"[44] where the employer may desire to carry on business during a strike.

ANALYSIS OF THE FACTS AND THE LAW

The Social Security Act of 1935 did not set up a federal unemployment compensation system. Rather it made it

[44] *Super Tire Eng. Co. v. McCorkle,* 416 U.S. 115, 124, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974).



possible for the states to establish their own systems and to provide incentives for them to do so.[45] State legislatures had considered the matter of unemployment compensation prior to the Congressional enactment but most of them had defeated such bills, fearing that a tax to finance their systems would handicap their industries in competition with those of other states.[46]

Congress overcame this problem and accomplished its objective primarily by imposing a national payroll tax on employers against which a credit is allowed for contributions made by them to qualifying state unemployment compensation funds.[47]

While this country's unemployment insurance scheme is a cooperative state-federal venture, *see Steward Machine Co. v. Davis,* 301 U.S. 548, 587-89, 57 S.Ct. 883, 81 L.Ed. 1279 (1937), the mere fact that the unemployment laws are under a federal umbrella does not in itself alter the preemption problem. See *Nash v. Florida Industrial Commission,* 389 U.S. 235, 88 S.Ct. 362, 19 L.Ed.2d 438 (1967). The [283]

role Congress played in shaping the nature of state laws is materially relevant to the subject of Congressional intent

[45] S.Rep.No.628, 74th Cong., 1st Sess. 12 (1935).

[46] *Id.* at 11; *Steward Mach. Co. v. Davis,* 301 U.S. 548, 587-89, 57 S.Ct. 883, 81 L.Ed. 1279 (1937).

[47] S.Rep.No.628, 74th Cong., 1st Sess. 12 (1935); *see* 26 U.S.C.A. §§ 3301-09 (1967, Supp.1975) (Unemployment Tax Act); 42 U.S.C.A. §§ 501-04 (1974) (grants to states for unemployment compensation administration); *id.* §§ 1101-08 (unemployment trust fund). If a state unemployment compensation law does not meet federal standards, the tax credit to its industries is denied. 26 U.S.C.A. §§ 3302(a)(1), 3304 (1967, Supp.1975).

to preempt, *see infra.* It must be kept in mind that this is not a case of conflict between two federal laws: the statute being challenged is not the Social Security Act but rather the Hawaii Employment Security Law as interpreted by its courts.[48]

*Labor Law Preemption*

The law of labor preemption to date has focused on state interference with employee activity protected or prohibited by the federal labor laws.[49] The principles of those cases, however, provide initial steps in analyzing whether state interference with employer activity, or state assistance to employee activity, is likewise preempted.

It is now axiomatic that state laws may not interfere with employee activities *protected* or *prohibited* by §§ 7 and 8 of the N.L.R.A.[50] Under the Supremacy Clause, since the Act guarantees federal rights, state laws that conflict with the federal legislation are invalid. *See Garner v. Teamsters Local 776,* 346 U.S. 485, 490-91, 74 S.Ct. 161, 98 L.Ed. 228 (1953); *San Diego Building Trades v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959); *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 276, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971). The *Garmon* principle, however, is not a constitutional rule. *Retail Clerks Local 1625 v. Schermerhorn,* 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963).

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[48] *See New York State Dep't. of Social Serv. v. Dublino,* 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1972).

[49] *See,* Cox, *Labor Law Preemption Revisited,* 85 Harv.L.Rev. 1337 (1972).

[50] 29 U.S.C.A. §§ 157, 158 (1973 & Supp. 1975); *see* Cox, *supra* note 49, at 1340-51, and cases cited therein.



*Local 20, Teamsters v. Morton,* 377 U.S. 252, 256-61, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964), sets out a basic rationale for analyzing previous labor law cases and bringing them within a unified system of preemption analysis.[51] *Morton* dealt with union activity that was clearly neither protected nor prohibited by federal labor laws, so the issue did not fit within any of the previous cases. The Court ruled, *id.* at 259-60, 84 S.Ct. at 1258:

> Allowing [the activity] is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. . . . If the Ohio law . . . can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe . . . the inevitable result would be to frustrate the congressional determination . . . and to upset the balance of power between labor and management expressed in our national labor policy.

Professor Archibald Cox, in preemption,[52] finds the key Congressional labor policies are the right to organize and to strike; and the solution of labor differences through collective bargaining enforced by economic sanctions.

It must be recognized that there is both an explicit and an implicit framework to the labor laws. The Taft-Hartley Act[53] explicitly forbids certain employer and union activities. Impliedly, the fact that there is no duty to reach agree-

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[51] *See* Cox, *supra* note 49 at 1350-51.

[52] *See id.* at 1351-59.

[53] Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified in scattered sections of 18, 29 U.S.C.A.).

ment—merel a duty to bargain in good faith[54]—means there is fre dom to bring economic pressure to bear on [284] collective bargaining. *See American Ship Building Co. v. NLRB*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965).

Congress, sometimes through the NLRB, attempts to balance the competing interests. All rules involve "nice judgments" [55] as to whether one approach or another would be more likely to obtain Congressional objectives. Nevertheless, the states, after *Morton,* cannot enforce their own views as to what the proper balance of those interests might be. Even in the absence of direct conflict between state and federal laws, the national scheme preempts the state power to act.[56]

While *Morton* explains the prior cases that deal with state infringement upon *employee* activity, it also applies to the issues that now face this court: state *aid to employee* activity or *infringement* of *employer* activity.[57]

The underlying problem in every preemption case is to determine the *outer limits* of Congressional concern; be-

[54] 29 U.S.C.A. § 158(d) (1973 & Supp. 1975).

[55] Cox, *supra* note 49, at 1353.

[56] There is no part in the formula for a "balancing" of federal and state interests, as suggested by the First Circuit in *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir. 1973), and *ITT v. Minter*, 435 F.2d 989 (1st Cir. 1970).

*Head v. New Mexico*, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963), and *Buck v. California*, 343 U.S. 99, 72 S.Ct. 502, 96 L.Ed. 775 (1952), inquire only as to whether there is a conflict between the statutes, but do not balance the interests underpinning them. Likewise, all the labor cases cited in the text *supra* do not refer to a weighing of interests.

[57] *See* text accompanying notes 3-43 *supra*.



yond these, there is no preemption. A court cannot "declare pre-empted all local regulation that touches and concerns in any way the complex interrelationships between employers, employees, and unions; obviously, much of this is left to the States." *Motor Coach Employees v. Lockridge, supra* 403 U.S. at 289, 91 S.Ct. at 1919.

Congress passes the federal labor laws within a larger framework of state law that creates property rights and regulates general welfare under the Tenth Amendment. State laws fall outside the limits of Congressional preemption if they

> apply to the general public . . . without regard to whether the individual is an employer, union, or employee concerned with unionization or a labor dispute.
>
> . . . . .
>
> It is only where the state law . . . is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes that the likelihood that its application . . . will upset the balance struck by Congress is so great as to require exclusion of state law unless Congress has provided otherwise.[58]

The "stoppage of work" test of striker eligibility for unemployment compensation, as interpreted by the Hawaii Supreme Court, inquires directly into the success or failure of a strike to close down an employer's business, *e. g.*, benefits may be paid only if the employer keeps its operation

[58] Cox, *supra* note 49, at 1355-56.

substantially ongoing. *See Hawaiian Telephone Co. v. State of Hawaii,* 378 F.Supp. 791, 792 (1974) (decision on preliminary injunction). By focusing on the effect of collective action by employees upon the employer's business operations when the parties are in the throes of a collective bargaining conflict, it impinges upon "the very subject addressed by Congress in the NLRA," and therefore is pre-empted,[59] unless Congress has provided otherwise.[60]

[285]

*Congressional Intent*

At the very inception of the problem of trying to find "the intent of Congress," it must be recognized that for the most part, "the principle of pre-emption that informs our general national labor law was born of [the Supreme] Court's efforts, without the aid of explicit congressional guidance." *Motor Coach Employees v. Lockridge, supra,* 403 U.S. at 286, 91 S.Ct. at 1918. The cooperative federal-state nature of our unemployment laws,[61] however, has from time-to-time brought forth expressions of Congressional views on the payment of unemployment benefits to strikers.

Congress itself, in formulating the District of Columbia laws has always excluded strikers from unemployment benefits.[62] Congress passed the first provision simultaneously with the Social Security Act of 1935.

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[59] *Id.* at 1357.

[60] *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 297, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971).

[61] *See* notes 45-48 *supra* and accompanying text.

[62] Since 1935, the law in the District of Columbia, although amended, has always excluded strikers. Act of Aug. 28, 1935, ch. 794, § 10(a)(6), 49 Stat. 946; Act of June 4, 1943, ch. 117, § 10(f), 57 Stat. 100; Act of Aug. 31, 1954, ch. 1139, § 10(f), 68 Stat. 988.



Congressional creation of policy for the District of Columbia, however, cannot be taken as an absolute in gauging its intent nationally. Because the District has no Congressional vote, Congress legislates for the District in a relative political vacuum, compared with political pressures upon it in formulating national legislation. At the most, one can conclude that Congress *might* have wished the District's policy upon the states *if* it did not have to heed its several constituencies.

Defendants argue that the Social Security Board, "certainly knowing the intent of Congress, approved state laws providing for unemployment compensation for strikers."[63] This fact is immaterial, since the Board was mandated to approve all state laws that met minimum conditions specified by Congress.[64]

Defendants also point to Congressional inaction in 1935 on several recommendations that state laws be required to deny benefits to strikers.[65] Careful examination of the legislative record, however, does not reveal whether Congress ever expressly considered these recommendations, all of which were contained in lengthy written reports, and none of whose proponents urged them upon the Congressional attention during hearings.[66]

Subsequent Congresses considered various proposals to eliminate benefits to strikers. All the legislative history argued by the parties here was fully explored by the First

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[63] Brief for Locals 1260 and 1357, and Hawaii State Federation of Labor, at 25.

[64] S.Rep.No.628, 74th Cong., 1st Sess. 47 (1935); *see* 26 U.S.C.A. § 3304(a) (1967, Supp.1975).

[65] *Hearings on S. 1130 Before the Senate Comm. on Finance,* 74th Cong., 1st Sess., at 228, 472, 959 (1935).

[66] *Id.* at 113, 121, 133, 223, 237, 238, 463, 959.

Circuit in *Grinnell, supra* at 454-57, in the context of a challenge of the Rhode Island law which, similar to New York's, provided for payment of unemployment benefits to strikers after a six-week waiting period subsequent and in addition to the general waiting period for all unemployed claimants.

For the purpose of this decision, the *Grinnell* opinion's reference to Nixon's proposal in 1969 to deny unemployment benefits to strikers must be amplified. Nixon's message accompanying the proposal explained the strike provision as follows:

> *Workers on Strike.*—The unemployment tax we require employers to pay was never intended to supplement strike funds to be used against them. A worker who chooses to exercise his right to strike is not involuntarily unemployed.
>
> [286]
>
> In two States, workers on strike are paid unemployment insurance benefits after a certain period. This is not the purpose of the unemployment insurance system.
>
> *I propose a requirement that this practice of paying unemployment insurance benefits to workers directly engaged in a strike be discontinued.*

Hearings Before the Committee on Ways and Means of the House of Representatives on H.R. 12625, 91st Cong., 1st Sess. 12 (1969).

The draft amendment contained the following provision, to be inserted after paragraph (6) of § 3304(a) of the Internal Revenue Code:

> (10) compensation shall not be paid *by reason of the expiration of a specified period of time* to an individual who has been disqualified under a labor dispute disqualification provision in such State law; (emphasis added) (*id.* at 25)



Similarly, the Taft-Hartley Act as passed by the House containing a provision that would have removed a striker from the status of employee if he was receiving unemployment compensation (see *Grinnell* and briefs) was also aimed at New York and Rhode Island statutes, even though the language was broad enough to affect strikers in Hawaii today.

The House provision, deleted in conference with the Senate, read:

> employee . . . shall also include any individual whose work has ceased as a consequence of a current labor dispute (unless such individual has been replaced by a regular replacement, or has obtained other regular and substantially equivalent employment, or is receiving unemployment compensation from any State). . . .

1 NLRB Legislative History of the LMRA 161 (1947).

The House Committee Report accompanying the bill explained the purpose of the provision as follows:

> *A few States pay strikers after the fifth, sixth, or seventh week of a strike.* This clearly is a perversion of the purposes of the social security laws . . . . We therefore have provided that a striker's status as an "employee" stops when he starts receiving unemployment compensation from any State. He may receive relief from his union, from local welfare funds, or from charity without losing that status. (Emphasis added)

*Id.* at 303-04.

The minority report, *id.* at 359, said:

> The bill apparently intends to discourage States from paying unemployment compensation to strikers by penalizing employees who accept unemployment compensation. Under the Social Security Act, however, the determination of those matters was advisedly left to the States.

From this court's analysis it seems unmistakable that by Congressman Mills' statement upon the 1969 legislation—"There are two States . . . which pay unemployment benefits when employees are on strike" (*Grinnell,* at 455)—he was referring to the New York and Rhode Island type of unemployment acts, acts which have a fundamental difference from Hawaii's, in the scope of their application.

There is no point in this decision to retrace the same road toward determination of Congressional intent that was so laboriously trudged by Judge Coffin in *Grinnell.* On the broad problem of payment of unemployment compensation to strikers, this court agrees with *Grinnell,* at 457 that "unambiguous Congressional intent is lacking" and (at 454):

> the existing legislative record is not sufficiently clear to establish Congressional intent either way, it strongly indicates Congressional awareness, the availability of opportunities to act, and Congressional action in closely related matters which would prove relevant *should the evidence on infringement and state interests be closely balanced.* (Emphasis added)



[287]

*The "Work Stoppage" Provision*

Neither from *Grinnell* nor from this court's own research is there any evidence that Congress was ever aware of the "work stoppage" problem imposed by the unemployment compensation act adopted in Hawaii and some other states.

As heretofore indicated, H.R.S. § 383-30 disqualifies one for benefits under "(4) Labor dispute. For any week . . . this his unemployment is due to a stoppage of work which exists because of a labor dispute at the . . . establishment . . . at which he is . . . employed."

"Like most other aspects of the Draft Bill, the stoppage of work requirement had its origin in the British Unemment Insurance Acts",[67] social legislation which preceded the American acts by over 20 years. It was natural therefore for the American courts to look to the decisions of the British Umpires for precedent in the interpretation of what superficially appears to be simple language. Unfortunately, where employees and employers are at odds, "nothing is simple." Shadur[68] continues:

> When this country's fifty-one statutes were adopted, the phrase had long since acquired a settled construction from the British Umpires as referring "not to the cessation of the workman's labour, but to a stoppage of the work carried on in the factory, workshop or other premises at which the workman is employed." It is scarcely surprising that the overwhelming majority of appellate decisions in the United States have adopted the same interpretation. (Footnotes omitted.)

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[67] Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification,* 17 U.Chi.L.Rev. 294, 308.

[68] *Ibid.*

That this "settled construction" may have not been so simple and finite as stated by Shadur and assumed by American courts is shown in the July 1946 study of "Principles Underlying Labor-Dispute Disqualification" made by Marsile J. Hughes of the Illinois Division of Placement and Unemployment Compensation at the request of the Federal Bureau of Employment Security and sent to state unemployment agencies. After making a detailed analysis of the "Analytic Guide to Decisions by the [British] Umpire", Hughes states:

> [I]t is apparent that the British authorities in determining whether a stoppage of work existed looked first to see whether any job vacancies were created by the dispute.
>
> . . . . .
>
> Under the British interpretation of the word "stoppage" the individual is disqualified for benefits if his unemployment is due to a trade dispute so long as the job which he held continues to be vacant. It would be necessary for the claimant to show that the job vacancy had been filled in some way in order to effect a termination of his disqualification. Vacancies might be terminated by the return of the worker, by the hiring of a replacement, or by a readjustment of work operations.[69]

Hughes' conclusions validate plaintiffs' contention that the Umpires' interpretation of "stoppage of work" would preclude payment of benefits to strikers unless they were permanently replaced or their jobs were eliminated.

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[69] M. Hughes, *Principles Underlying Labor-Dispute Disqualifications* 26 (1946).



*American Decisions*

Assuming the plaintiffs' version of the Umpires' decisions to be correct, it appears that the American courts that first considered the issue were correct in their results but used imprecise conclusitory language, just as did Shadur, with an almost inescapable overbroadening of the British rule.

The earliest case cited is *Magner* v. *Kinney,* 141 Neb. 122, 2 N.W.2d 689 (1942). This involved a strike that began after an impasse in collective bargaining. There is no evidence that the strikers were replaced, and the action decreased total business transacted by the employer more [288] than 30 per cent. The court adopted what it believed to be the Umpires' construction, viz., " 'stoppage of work,' . . . is a substantial curtailment of work in an establishment, not the cessation of work by the . . . claimants." 2 N.W.2d at 692. The court concluded that 30 per cent curtailment of business was "substantial" and denied benefits.

*Lawrence Baking Co.* v. *Michigan Unemployment Compensation Commission,* 308 Mich. 198, 13 N.W.2d 260 (1944), is repeatedly cited as the leading case on the issue. The case arose from an organizational strike, in which 16 union members of plaintiff's 98 employees went on strike, disrupting operations for about 15 minutes. The employer "immediately" hired replacements and notified the strikers of this fact. *Lawrence Baking* did not rely directly on incorrect reading of the Umpires' construction of work stoppage, although it quoted at length from *Magner.* Rather, it argued that the interpretation given Nebraska's law by the *Magner* court is part of the evidence

that Michigan intended the same construction when it later adopted similar statutory language. 13 N.W.2d at 262-63. The court affirmed the award of benefits to the strikers, the same result that would have obtained had the Umpires' approach been followed, since the strikers had been replaced.

By the time the Hawaii Supreme Court ruled in *Inter-Island Resorts* v. *Akahane,* 46 Haw. 140, 377 P.2d 715 (1962), the American version of the work stoppage test was firmly ensconced, and broad enough to provide benefits to employees who had not been replaced after going on strike. An organizational strike had been called against the Kona hotel. During the first two days, the hotel operated with the help of supervisors and guests. Service was somewhat curtailed but the hotel remained open. Later in the week, the employer hired some replacements and full operations resumed. The union was informed that 11 positions were still vacant; 32 employees had begun the strike. The positions were not accepted.

As to those employees who had been replaced, the British Umpires' interpretation of work stoppage would allow payments of benefits. The Hawaii court went further, however, and found all the claimants to be eligible under the American work stoppage test The same general pattern reoccurred in *Gaspro* v. *Labor & Ind. Rel. Comm'n,* 46 Haw. 164, 377 P.2d 932 (1962), viz., an organizational strike, Gaspro shut down temporarily, then permanent rehire and business continued. The strikers lost their jobs.

The holdings of both *Akahane* and *Gaspro* would have been justified under the British construction of "work stoppage."



It was with *Meadow Gold Dairies* v. *Wiig,* 50 Haw. 225, 437 P.2d [illegible] (1968), that Hawaii, like many other state courts having similar "stoppage of work" clauses in their unemployment acts, went far beyond the British rule and gave benefits to strikers—without regard to job loss—when the employer was able to keep up substantial (about 80% in Hawaii) operations.

*The Legal Issue*

*Meadow Gold* and the subsequent state awards anent the Hawaiian Electric strike thus have with certainty in Hawaii created the problem now before this court: Has Hawaii's interpretation and application of the "stoppage of work" clause in its Unemployment Compensation Act so impermissibly altered and affected the relative economic strength of union versus employer in their bargaining relationship, as to thereby encroach upon and into the field preempted by the NLRA in violation of the Supremacy Clause of the Constitution?

*Congressional Intent and the Issue*

As heretofore found, even in the broader problem of payment of benefits to strikers, where the issue of "work stoppage" is not involved, a clear determination of "Congres-

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sional intent" cannot be made. Moreover, on the question of work stoppage and payment to strikers, not even a whisper of "Congressional intent" has been heard. The *best* that can be said is that its intent is ambiguous in this labor law area. Although any clarity of Congressional intention be lacking, the court must nevertheless decide whether Hawaii's law impermissibly interferes in a federally preempted field. Under the preemption doctrine, state legislation may be invalid even if it does not

directly interfere with federal legislation.[70] When the legislative schemes underlying the Social Security Act and the N.L.R.A. are compared, it is apparent that in the labor area, except in the narrow area in which the states' traditionally intense interest in public order survives, Congress intended to preempt the labor field.[71]

*Employers' "Rights"*

Plaintiffs have maintained and defendants have denied that an employer has a right under the N.L.R.A. to keep his business operating during a strike. True, there is no specific statement in the N.L.R.A. that an employer has such a right. That right exists, nevertheless. As the Ninth Circuit said in *Hawaii Meat Co. v. NLRB,* 321 F.2d 397, 400 (1963): "No case holds that a struck employer may not try to keep his business operating; on the contrary, it is quite clear that he has the right to do so." In accord are *NLRB v. Mackay Co.,* 304 U.S. 333, 345, 58 S.Ct. 904, 82 L.Ed. 1381 (1938), as well as *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 232, 831 S.Ct. 1139, 10 L.Ed.2d 308 (1963).

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[70] *See Conceptual Refinement of the Doctrine of Federal Preemption,* 22 J.Publ.L. 391 (1973); Note, *Federal Preemption,* 1966 Duke L.J. 484.

[71] Cox, *supra* note 49, at 1358. Hawaii's interest in paying unemployment benefits to strikers is in no way analogous to state interest in preventing violence on the picket line, *see San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), and therefore not within the public order exemption.



SYNTHESIS OF FACTS

(as found here and in this court's prior decision)

A. *Employees*

1. No striker's job was ever in jeopardy
2. Before the strike, at least some employees were concerned about receiving unemployment benefits.
3. During the strike, almost all 3000 strikers applied for and expected to get benefits.
4. The benefits would provide for a large percent of a striker's regular pay, *i. e.,* needs.
5. Strikers, after filing of the instant suit, condemned the action as diminishing "our ability to strike."
6. Ruttenberg acknowledged impact of benefits.

B. *Employers*

1. TELCO states possible payment of benefits and additional tax burden affected bargaining offer.
2. TELCO's negotiator stated it was a factor in the talks.
3. TELCO was ordered by the state to divulge its financial and operative facts to the state (and union) during the strike.
4. TELCO was facing a possible tax "contribution" of over $190,000 per week of strike, with no assurance of recovery, while it kept business operating.

C. *State*

1. State actively assisted union and strikers in filing claims.

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2. State demanded disclosure of TELCO's earnings and other financial data during strike.
3. If an employer closes down operations during a strike, the state pays no benefits to strikers.[72]

CONCLUSIONS

It was unquestionably the intent of Congress that collective bargaining, free from state interference, should be the foundation of the federal labor policy. *Local 24, Teamsters v. Oliver,* 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed.2d 312 (1959); *Local 20, Teamsters v. Morton,* 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964). Employer and employees alike have a right to the benefit of every privately furnished economic weapon available in implementing their respective bargaining positions, in carrying on or opposing a strike. Contributions by fellow unions and employers are permitted.[73] Unless the state activity is but a peripheral concern of the Act or there is an overriding state interest, a state may not assist either party in a labor dispute, *i.e.,*

[72] A vital facet of the factual inquiry before this court is *not* whether benefits are paid to strikers. Rather, under *Grinnell,* it is whether the payment of money in fact *affects* the collective bargaining process or is *extraneous* to that process.

[73] *Kennedy v. Long Island Rail Road Co.,* 319 F.2d 366 (2nd Cir. 1963); *Air Line Pilots Assn. International v. C. A. B.,* 163 U.S.App.D.C. 451, 502 F.2d 453 (1974).



interfere with free collective bargaining,"[74] a state must be neutral.

> For a State to impinge on the area of labor combat designed to be free is quite as much an obstruction of Federal policy as if the State were to declare picketing free for purposes of or by methods which the federal Act prohibits. *Garner v. Teamsters,* 346 U.S. 485, 500, 74 S.Ct. 161, 98 L.Ed. 228 (1953).

Under Hawaii's law, when the avowed objective of closing down the employers plant[75] is achieved by the union, no benefits may be paid the strikers. The state is then neutral. When, however, the employer is successful in resisting the union attack, and keeps his business in substantially full operation, the state, after the first week of the strike, takes sides against the employer, and for the strikers. As indicated, it sets about giving great financial assistance to the strikers, and extracting valuable (to the strikers) financial and other information, as well as burdening the employer with future increased tax burdens. The strikers' position when a strike is called, with the state's assist, becomes one of "heads I win, tails you lose"!

On its face, therefore, Hawaii's statute irreconcilably intrudes into the federal process of free collective bargaining.

[74] *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966); *Plumbers' Union v. Borden,* 373 U.S. 690 (1963); *Automobile Workers v. Russell,* 356 U.S. 634, 78 S.Ct. 932, 2 L.Ed.2d 1030 (1958); *John Hancock Mutual Life Insurance Co. v. Commissioner of Insurance,* 349 Mass. 390, 398, 208 N.E.2d 516, 522 (1965).

[75] Henry B. Epstein, state director of the U.P.W., Tr. Dec. 10-17, at 207, 229.

It cannot with any validity be argued that Hawaii's law implements any necessary "state purpose". The striker picketing a closed-down shop is just as in need of benefits as is the striker picketing a shop in full operation. Nevertheless Hawaii now gives aid to the latter but none to the former.

Congress has never even inferred that it approves this anomalous situation. In the absence of any Congressional approval, it can only be said that Hawaii's statute impermissibly intrudes into the area of labor law fully occupied by the N.L.R.A. The application of Hawaii's law also clearly frustrates Congress' ukase that the collective bargaining process must be free from state interference. Hawaii's statutory scheme for unemployment assistance to strikers therefore cannot stand, but must be stricken down.

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TELCO's prayer for a permanent injunction is granted.

Plaintiffs will prepare the order. TELCO's bond is cancelled.

AMENDED DECLARATORY JUDGMENT AND ORDER FOR PERMANENT INJUNCTION

It is hereby ordered and declared that defendants' payment or consideration for payment of claims for unemployment compensation benefits for periods of unemployment incurred by claimants' participation in a strike against an employer engaged in interstate commerce, as Hawaii Revised Statutes, Section 383-30(4), has been and is now applied, constitutes an unlawful and impermissible infringement upon the scheme of collective bargaining established and preempted by Congress, in violation of the supremacy clause of the Constitution of the United States;



It is further ordered and declared that H.R.S. § 383-30 (4), insofar as it presently is administered to disqualify other claimants unemployed due to a labor dispute, is valid;

It is further ordered and declared that the State of Hawaii Department of Labor and Industrial Relations and its Director and employees shall permanently cease and refrain from investigating, processing, disclosing information regarding employer operations, or making payment upon claims for unemployment compensation filed by or on behalf of any individual employed by Hawaiian Telephone Company whose unemployment during the period from May 7 to June 16, 1974, was due to a labor dispute at the factory, establishment or other premises of Hawaiian Telephone Company during such period, or by or on behalf of any other individual employed by any other employer engaged in interstate commerce or in an industry affecting interstate commerce, as such employer or industry is defined by the National Labor Relations Act, if such individual's unemployment is due to a labor dispute at the factory, establishment or other premises of such employer;

It is further ordered and declared that nothing herein shall prevent or enjoin any person from filing any claim for State of Hawaii unemployment benefits;

It is further ordered and declared that with respect to labor disputes involving an employer engaged in interstate commerce or in an industry affecting interstate commerce

as defined in the National Labor Relations Act and related claims for unemployment compensation benefits requiring application of H.R.S. § 383-30(4) arising after the entry of this Judgment, the Department of Labor and Industrial Relations shall refrain from investigating such claims until leave of court is obtained for good cause, upon at least 48 hours advance notice to the employer and labor organizations involved in said labor dispute;

It is further ordered and declared that the Director of the State of Hawaii Department of Labor and Industrial Relations shall, effective December 1, 1975, advise all claimants for unemployment compensation that claims will not generally be processed nor benefits paid for periods during which claimant is on strike or otherwise not working due to participation in a labor dispute with an employer engaged in interstate commerce or an industry affecting interstate commerce;

It is further ordered and declared that there being no just reason for delay, that Count II of the Complaint herein shall be and hereby is ordered dismissed without prejudice. In the event plaintiffs renew Count II, no finding of laches or statute of limitations shall bar relief otherwise found therein to be appropriate, provided timely renewal is made by plaintiffs subsequent to any dissolution or modification of these orders.

It is further ordered and declared that the Clerk shall enter this Amended Order as the final Judgment herein in lieu of any prior Judgment entered and that each party shall bear its own costs of these proceedings.

No. 77-962

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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HAWAIIAN TELEPHONE COMPANY

and

HAWAII EMPLOYERS COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES, and CHAMBER OF COMMERCE OF HAWAII,
*Joint Petitioners,*

v.

STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, ET AL.,
*Respondents.*

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## JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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## JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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### I. The Issue Presented By the Petition Has Already Been Decided By This Court Against Petitioners' Position.

The issue which petitioners urge this Court to review is whether Hawaii's grant of unemployment compensation benefits to strikers under certain circumstances is contrary to the policies of the National Labor Relations Act and on that ground contravenes the Supremacy Clause. That issue has already been decided against petitioners' position in *Kimbell* v. *Employment Security Commission of New Mexico*, 429 U.S. 804, a case in which this Court, on an appeal from the Supreme Court of New Mexico, dismissed as insubstantial the question:

> "Does the grant of unemployment compensation benefits to strikers by the State of New Mexico contravene the Supremacy Clause of Article VI of the

> Constitution of the United States by disrupting the operation of federal labor policy requiring state neutrality in the collective bargaining process?" [1]

The Court acted in *Kimbell* only after inviting the views of the United States. In response, the Government declared:

> "The preemption issue initially turns on Congress' intent when it enacted and subsequently amended the National Labor Relations Act * * * and the Social Security Act. * * * The history of those Acts shows that Congress concluded that a uniform policy on the payment of unemployment compensation to strikers was not essential to the federal regulatory scheme, and thus elected to leave this matter to the judgment of each State." [2]

The United States therefore urged that "the appeal should be dismissed for want of a substantial federal question".[3] This Court agreed.[4]

Petitioners assert that the "instant case differs significantly from *Kimbell* * * *".[5] None of the distinctions which they proffer has the slightest merit, as we now show.

*First*, petitioners assert that in *Kimbell*, "the record did not disclose whether the employers were subject to the NLRA". (Pet. 15, n.12.) It is clear from the papers

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[1] Jurisdictional Statement, No. 75-1452, p. 4.

[2] Memorandum for the United States, No. 75-1452, p. 5, (hereafter, "U.S. Mem.").

[3] *Id.*, p. 11. The appellants and the Chamber of Commerce filed briefs in response to the Government's Memorandum.

[4] The Court's Order reads in its entirety as follows: "75-1452 Kimbell, Inc. v. Employment Security Comm. of New Mexico. The motion of Chamber of Commerce of the United States for leave to file a brief, as amicus curiae, is granted. The appeal is dismissed for want of a substantial federal question. Mr. Justice Brennan, Mr. Justice Blackmun and Mr. Justice Stevens would note probable jurisdiction and set the case for oral argument." (429 U.S. 804.)

[5] Petition for certiorari (hereafter "Pet."), p. 15, n.12.



filed in this Court and from the decision of the New Mexico courts that everyone including the Chamber of Commerce, as *amicus curiae*, assumed that the employers were so subject. In fact, the cover of the Jurisdictional Statement showed that one of the employer parties involved in that case was Safeway Stores, Inc. This alone was certainly sufficient indication that an employer subject to federal labor policy was affected, so that there was no reason to doubt a predicate that was not questioned. Indeed, if the *Kimbell* appellants had failed adequately to demonstrate that federal law was applicable, this Court's disposition would have been to dismiss the appeal "for want of a properly presented federal question". Compare *National Gypsum Co.* v. *Louisiana Dept. of Employment Security*, 313 S. 2d 527 (La. Sup. Ct.), *appeal dismissed for want of a properly presented federal question*, 423 U.S. 1009, where the question presented was basically the *same* as that in *Kimbell* and here, but the federal issue had not been timely raised and this Court therefore did not, as evidenced by the different language used in the dismissal order, reach the merits.

*Second*, petitioners say that "[i]t appears the claimants [in *Kimbell*] were locked out". (Pet. 15, n.12.) This attempted distinction is inconsistent with the proposition petitioners assert—that the NLRA is controlling. For that law does not differentiate between the employer's right to achieve his bargaining objectives by continuing operations during a strike and achieving those objectives by locking out the employees after impasse. (See *American Ship Bldg.* v. *Labor Board*, 380 U.S. 300.)[6]

*Third*, it is said, "Unlike Hawaii, New Maxico had no fixed policy in advance of the strike." (Pet. 15, n.12.)

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[6] Compare the heading of Part II of the brief for the Chamber of Commerce as Respondent-Intervenor in *Batterton* v. *Francis*, No. 75-1181, p. 29: "Maryland's disqualification provisions properly deny AFDC-UF benefits to striking employees, but improperly confer these benefits upon locked out employees".

On the contrary, New Mexico's "policy" was fixed in its unemployment compensation statute, which is identical in this respect to that of Hawaii [7] (as well as many other States),[8] and which has been interpreted in the same manner by the Supreme Courts of both States [9] in accord with "the overwhelming majority of appellate decisions in the United States." [10]

*Fourth*, petitioners say: "Contrary to the facts in *Hawaiian Telephone*, it appears that strikers-claimants in New Mexico must be available for work and must register for work." (Pet. 15, n.12). Petitioners do not explain why, if this were so (and it is not so [11]), it would provide a basis for distinguishing between the New Mexico and Hawaii schemes so as to render *Kimbell* inapplicable here. And there is no such viable distinction. For it is clear that in *Kimbell* payments were made to *some* strikers, and that fact makes it plain that in making this

[7] The New Mexico statute provides that an applicant for unemployment compensation shall be disqualified from benefits "[f]or any week with respect to which * * * his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed * * *." New Mexico Unemployment Compensation Law of 1936, § 59-9-5(d), N.M. Stat. Ann. (Supp. 1975). Compare Hawaii Revised Statutes, § 383-30(4) set forth at Pet. pp. 4-5.

[8] See Pet. 17.

[9] Compare *Albuquerque-Phoenix Express, Inc.* v. *Employment Security Comm'n*, 88 N.M. 596, 554 P.2d 1161 with *Meadow Gold Dairies* v. *Wiig*, 50 Haw. 225, 437 P.2d 317.

[10] Pet. 45a quoting Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U.Chi.L.Rev. 294, 308 (1950).

[11] The trial court in this case did not find, and the record does not show, that strikers-claimants are relieved of the "availability" requirement of § 383-29(3), Hawaii Rev. Stat., which provides that a claimant must be "able to work" and "available for work". Hawaii does not, to be sure, require strikers to register for work with the employment service; that is because registration for work is waived for all benefit claimants still attached to an employer. (Tr. Dec. 13, 1974, pp. 700-701.)



point petitioners are again unfaithful to their thesis that any payment of unemployment benefits to strikers is contrary to the NLRA.

*Fifth*, petitioners say: "Moreover, the only issue there presented was the narrow question of post-strike payments. The impact of benefit availability was never litigated therein. See *Kimbell* Jurisdictional Statement, pp. 8-9." (Pet. 15, n.12.) However, in *Kimbell* the Chamber of Commerce said that "four lawsuits [including *Hawaii Telephone* and *New York Telephone* [12]] now pending before the federal courts present the same generic issue involved in this appeal". It also observed that in all the pending cases, there already was or would be "a full record documenting and measuring the impact on collective bargaining * * * of the unemployment insurance subsidy to strikers * * *".[13] Accordingly, the Chamber concluded that if *Kimbell* is not summarily reversed, this Court "should not foreclose subsequent determinations in the pending cases where the issue is more completely and less abstractly presented".[14] The way to preserve the generic labor preemption question for consideration by those courts was, the Chamber insisted, for this Court to qualify its dismissal in *Kimbell* as it had done in *National Gypsum* p. 3, *supra*, with the words "for want of a properly presented federal question" or by noting that "the constitutional issue comes to the Court in highly abstract form".[15]

This Court, of course, chose instead to treat with the question presented on the merits and to dismiss "for want of a substantial federal question".

[12] Brief for the Chamber of Commerce as *amicus curiae*, No. 75-1452, p. 2.

[13] *Id.*, p. 3.

[14] *Id.*, p. 25.

[15] *Id.*, pp. 25-26.

*Lastly*, petitioners assert "Indeed, the federal preemption issue was mentioned only briefly—and then only in a footnote in another case which the New Mexico Supreme Court cited as the sole basis for its decision where it *distinguished* the case from *Hawaiian Telephone. Albuquerque-Phoenix Express, Inc.* v. *Employment Security Comm'n*, 88 N.M. 596, 554 P.2d 1161, 1165 n.1 (1975)." (Pet. 15-16, n.12, emphasis in original.) But, petitioners are quite wrong in saying that the New Mexico Court "distinguished" that case from *Hawaiian Telephone;* in the cited footnote, that Court expressly disagreed with the District Court's decision in this case:

> "We note the recent case of Hawaiian Tel. Co. v. State of Hawaii Dept. of L. and I. Rel., —— F.Supp. —— (D. Hawaii 1975), wherein the Federal District Court of Hawaii declared that the State of Hawaii's interpretation and application of the 'stoppage' of work clause in its Unemployment Compensation Act so impermissibly alters the relative economic strength of union versus employer in their bargaining relationship as to thereby encroach upon the field preempted by the National Labor Relations Act in violation of the supremacy clause of the U.S. Constitution. We do not find this decision persuasive because it totally overlooks the fact that in order to qualify for unemployment compensation a striker must be available for, and actively seeking work."

Moreover, as the Court of Appeals for the Third Circuit said in rejecting a similar argument:

> "To the extent that appellants, in their second argument, are contending that the federal issue, though raised, was not *decided* by the state high court in *Kimbell* they ignore both the reference to *Albuquerque-Phoenix Express* and, more elementally, the basic jurisprudential fact that not to decide is to decide. * * * The federal question was raised and, if decided adversely to state law, it was con-



trolling. Under these circumstances, a state high court does not defeat federal review merely by issuing a tight-lipped decision in favor of the challenged state law. The New Mexico Supreme Court may not have *discussed* the federal issue in its summary disposition in *Kimbell* but for purposes of § 1257(2) it necessarily *decided* the issue, adversely to the claim that the state practice offended federal law when it reversed the lower court's decision upholding the notion that payment of state unemployment benefits interfered with the national labor policy. This would be so even if the reversal had not cited *Albuquerque-Phoenix Express.* Again, if the United States Supreme Court had concluded that there was no 'decision' in favor of the validity of the state law as required by § 1257(2), it would not have entertained jurisdiction in the case and would not have reached the merits as it did." [16]

## II. No Court of Appeals Has Ever Decided The Issue Presented By The Petition In Favor of Petitioners' Position.

Petitioners state that they "are vitally concerned that the Second Circuit decision in *New York Tel* [*Co.* v. *New York State Dept. of Labor*, 556 F.2d 388, petition for certiorari pending, No. 77-961] be reviewed, and ultimately reversed by this Court" (Pet. 21.) This explains, if it does not justify, their extraordinary tactic of filing a petition for certiorari in this case before judgment in the Court of Appeals.[17] These two petitions for certiorari, the

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[16] *Super Tire Engineering Co.* v. *McCorkle*, 550 F.2d 903, 907-908 (C.A. 3) (footnote omitted; emphasis in original), *cert. denied*, 46 L.W. 3215 (Oct. 3, 1977), r'hg. den., 46 L.W. 3437 (Jan. 9, 1978).

[17] In *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963) and in the *New Haven Inclusion Cases*, 399 U.S. 392 (1970), the petitions for certiorari arose out of the same administrative proceeding as a case which was before this Court in the normal course. And even petitioners would not contend, we suppose, that this case is of equal

simultaneously filed motion for leave to file a petition for rehearing out of time from the denial of certiorari in 1973 in *Grinnell Corp.* v. *Hackett*,[18] and a petition for rehearing from the denial of certiorari in *Super Tire*, *supra*, comprise a carefully orchestrated effort to create the impression that there is a live issue of public importance calling for this Court's resolution.[19] But while this flurry of papers is designed to obscure, it cannot con-

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significance with *Brown* v. *Board of Education*, 344 U.S. 1, the other case cited at Pet. 11, or with such cases as *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 and *U.S.* v. *Nixon*, 418 U.S. 683, in which certiorari was also granted before judgment in the Court of Appeals.

[18] 414 U.S. 858, denying certiorari to review 475 F.2d 449 (C.A. 1).

[19] We also note the Chamber of Commerce's efforts to have this Court decide the preemption issue in the context of two other cases in which this Court had granted review to decide entirely distinct issues. See the Chamber's briefs in *Ohio Bureau of Employment Security* v. *Hodory*, No. 75-1707, *passim* and in *Batterton* v. *Francis*, No. 75-1181, at pp. 21-32.

In *Hodory*, the Court said: "At no point in this litigation has appellee claimed that § 4141.29(D)(1)(a) conflicts with or is preempted by any provision of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* We do not today consider or decide the relationship between that Act and a statute such as § 4141.29(D)(1)(a)." (431 U.S. 471, 475, n.3.)

In *Francis*, the Chamber had filed a separate petition for certiorari, No. 75-1182, to review the ruling quoted at p. 10, *infra*. This Court initially deferred consideration of that petition, and ultimately denied it "[i]n light of" the decision in *Batterton*, 432 U.S. 416, 424, n. 7. While petitioners here rely on this footnote (Pet. 15, n.12), the petitioners in *Super Tire* stated more accurately: "In fact the Court in *Batterton* v. *Francis* dealt with one narrow, limited issue which does not affect the broader policy questions raised by the instant petition." (Petitioners' Reply To Brief In Opposition, No. 76-1684, p. 2).

The above-quoted refusals to decide issues which were not then before this Court contrast sharply with the disposition on the merits in *Kimbell*, where the "pre-emption issue" was squarely presented and fully briefed, see p. 2, nn.1-3, *supra*.



ceal, the fact that *no appellate court* has ever decided the issue presented in favor of petitioners' position.[20]

While *Super Tire* sought an extension of time to file its petition for rehearing from the denial of certiorari on the ground that *New York Telephone* was then *sub judice* in the Second Circuit and might give rise to a conflict, the only "conflict" to which *Super Tire* could point after that court ruled was between the view of the Third Circuit that *Kimbell* had already determined the preemption claim to be insubstantial and that of the Second Circuit that *Kimbell* did not dispose of the issue.[21] The *result* in

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[20] In attempting to breathe life into their preemption issue, petitioners in these cases have ensnared themselves in a web of contradictions. Two illustrations will suffice:

1) Although the Chamber of Commerce now attempts to differentiate its present attack on the Hawaii statute from its attack on the New Mexico statute in *Kimbell*, its brief in that case (p. 21) declared that the District Court's "conclusions [in *Hawaii Telephone*] are equally applicable to the virtually identical New Mexico law here involved." Its brief *amicus* in *New York Telephone* avoids the need for further self-contradiction by simply ignoring *Kimbell*.

2) Petitioners in *New York Telephone* assert that *Kimbell* "involved a different statute" (Pet. No. 77-961, p. 14, n.10). Yet they point to "a swelling volume of litigation in federal and state courts across the country challenging the validity of such payments on the very grounds here asserted" (*id.* p. 14), which includes several attacks on the Hawaii statute. That litigation could be resolved by a decision in *New York Telephone* only if the issue under the Hawaii statute is the same as that under the New York statute, which in turn is possible only if the New York and New Mexico statutes are likewise equated, for, as we have seen, the Hawaii and New Mexico statutes *are* identical.

[21] Petition for Rehearing, No. 76-1684, pp. 2-4.

Compare the letter of counsel to the Ninth Circuit in the instant case, responding to our reliance on the Third Circuit's decision in *Super Tire:*

> "First, the Chamber wishes to inform this Court that a timely petition for rehearing with suggestion for rehearing *en banc*, as authorized under Rule 40(a) and (b) Fed. R. App. P., was filed in the *SuperTire* case on March 11, 1977. At present the Third Circuit has made no disposition of this petition. If the petition is denied, *counsel for SuperTire, who is also counsel*

both cases was, of course, the same; *viz.*, a rejection of the plaintiffs' attack on public assistance to strikers, in *Super Tire* on the authority of *Kimbell*, and in *New York Telephone* on the basis of a comprehensive *de novo* analysis of the legislative materials.

Again, while petitioners in *New York Telephone* assert a conflict between the Second Circuit's decision and that of the First Circuit in *Grinnell*, which had, prior to *Kimbell*, directed a trial on the preemption issue, there is no reason to assume that on a full record the First Circuit would reach a different result than the Second Circuit.[22]

Additionally, in *Francis* v. *Batterton*[23] the Fourth Circuit determined, in passing on another federal-state cooperative program:

> "We reject the contention of the Chamber of Commerce that we should undertake to resolve what the Chamber considers to be an intolerable tension between Aid for Dependent Children (of parents involved in a labor dispute) and the National Labor Relations Act. We do not view the national labor policy and the national social policy as irreconcilable,

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*for the Chamber of Commerce of the United States*, will seek a stay of mandate pending petition to the Supreme Court for certiorari, as authorized under Rule 41(b) Fed. R. App. P. Thus, the Third Circuit's decision is still in litigation, and because it constitutes an improper application of the ruling in *Hicks* v. *Miranda*, 422 U.S. 332 (1975) is likely to be reconsidered."

(Letter from Gerald Smetana, Esq., to Emil Melfi, Jr., Clerk, United States Court of Appeals for the Ninth Circuit, dated March 28, 1977, p. 2, emphasis added).

[22] The plaintiff's motion for leave to file a petition for rehearing in *Grinnell*—whose thesis is that the First Circuit was wrong in directing a trial on the issue rather than deciding it in plaintiff's favor—betrays an understandably pessimistic evaluation of its prospects if that litigation is permitted to run its course.

[23] 529 F.2d 514 and 515 (C.A. 4), reversed on other grounds, 432 U.S. 416.



> but if they are so viewed, there is presented a policy question for the Congress that is not for us to decide."[24]

In sum, every Court of Appeals that has finally decided the question, has held that the grant of public assistance to strikers by the States is consistent with the Supremacy Clause.

## CONCLUSION

The question whether States may pay unemployment compensation benefits to strikers without violating federal law involves, as the United States argued in *Kimbell* and the Second Circuit held in *New York Telephone*, an inquiry into the intent of Congress.[25] That inquiry shows, *first*, that in enacting the basic unemployment compensation law in 1935, concurrently with the passage of the original National Labor Relations Act, Congress deliberately adopted the policy that the states are to be left free to decide whether and under what conditions strikers are eligible for unemployment benefits, and that this policy has never been abandoned (see U.S. Mem. pp. 5-6; 566 F.2d at 391-394); *second*, that in 1947, Congress, fully aware that from 1935 to that date the NLRA had not been understood to preempt state laws which permit the payment of unemployment compensation to strikers, consciously preserved that preexisting law (see U.S. Mem. pp. 6-7; 566 F.2d at 394); and *third*, that two existing analogous benefit programs over which Congress has retained plenary federal control affirmatively require that

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[24] See p. 103 of Petitioners' Joint Appendix in Nos. 75-1181 and 75-1182, where the Fourth Circuit's unreported opinion is reproduced.

[25] In determining whether an act of Congress preempts state law, "[t]he purpose of Congress is the ultimate touchstone". *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103.

strikers be eligible, a factor which reinforces the conclusion that in Congress' view there is no repugnance whatsoever between striker eligibility for benefits paid either on an insurance or a need basis and the system of collective bargaining mandated by the NLRA (see U.S. Mem. p. 7; 566 F.2d at 394-395).

The Petition for Certiorari is without merit and should be denied.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-962**

HAWAIIAN TELEPHONE COMPANY

and

HAWAII EMPLOYERS COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES and CHAMBER OF COMMERCE OF HAWAII,

*Joint Petitioners,*

v.

STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, ROBERT K. HASEGAWA, THOMAS S. BROWN,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1357 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1260, and HAWAII STATE FEDERATION OF LABOR, AFL-CIO,

*Respondents.*

## JOINT PETITIONERS' REPLY BRIEF

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*Respondents.*

## JOINT PETITIONERS' REPLY BRIEF

Respondents predicate their opposition to this joint petition upon the narrow and tenuous ground that this

Court's summary disposition of an appeal from an unreported, summary decision of the New Mexico Supreme Court in *Kimbell* represents the Supreme Court's final word upon this important issue. A summary disposition, be it affirmance or dismissal of an appeal, is not of the same precedential value as an opinion of this Court on the merits, *Edelman* v. *Jordan,* 415 U.S. 651, 670-671 (1974), *Tully* v. *Griffin, Inc.,* 97 S.Ct. 219, 223 (1976), and "does not, of course, foreclose this opportunity to consider more fully [the] question." *Massachusetts Board of Retirement* v. *Murgia,* 96 S.Ct. 2562, 2654, n. 1. Neither the record, the jurisdictional statement, nor the motion to dismiss the appeal in *Kimbell* squarely presented to this court the question of whether Congress has condoned employer support of strikers and the consequent alteration of relative bargaining strength. Respondents' view of *Kimbell* is not shared by the Second Circuit or the District Courts in Hawaii, Michigan and New York, each of which has concluded that this Court's dismissal in *Kimbell* does not respond to or resolve the preemption issue as it is presented here.* In *New York Telephone,* the

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* *New York Telephone Co.* v. *New York State Department of Labor,* 556 F.2d 388 (2nd Cir., 1977) [petition for certiorari pending in No. 77-761]; *Hawaii Employers Council* v. *State of Hawaii Dep't of Labor & Indus. Rel. (Pearl Harbor Fed. Credit Union),* Civil No. 74-262 (D. Hawaii July 5, 1977) (appeal filed 9th Cir.); *Dow Chem. Co.* v. *Taylor,* 428 F. Supp. 86 (E.D. Mich. 1977), certified to 6th Cir. (E.D. Mich. May 19, 1977) (No. 77-8064); *American Broadcasting Cos.* v. *New York State Dep't of Labor,* 77 Civ. 2995 (S.D. N.Y. June 30, 1977). Following his decision in *Hawaiian Telephone,* U. S. District Court Judge Martin Pence, in ruling on motions for summary judgment in other, pending consolidated cases stated that nothing in *Kimbell* or *Super Tire* would cause him to change the opinion he rendered in the instant case. *Philco-Ford Corp.* v. *State of Hawaii Dept. of Labor and Industrial Relations,* No. 75-44; *Mailwell Envelope Co. of Hawaii, Inc.* v. *State of Hawaii Dept. of Labor and Industrial Relations,* No. 75-131 (D. Hawaii, July 5, 1977).



Second Circuit considered whether the summary dismissal of *Kimbell* was controlling:

> In *Kimbell, Inc.* v. *Employment Security Commission of New Mexico,* 429 U.S. 804 (1976), the Supreme Court dismissed, for want of a substantial question, an appeal which raised, *inter alia,* the question at issue here. [Citations omitted.] We must therefore decide whether, under the doctrine of *Hicks* v. *Miranda,* 422 U.S. 332 (1975), the *Kimbell* dismissal is controlling. [Citations omitted.] We agree with the district court that it is not. See also *Dow Chem. Co.* v. *Taylor,* 428 F. Supp. 86 (E.D. Mich. 1977). The district court's view has been confirmed by subsequent indications from the Supreme Court itself. *Ohio Bureau of Employment Servs.* v. *Hodory,* 45 U.S.L.W. 4544, 4545 n.3 (May 31, 1977); *Batterton* v. *Francis,* 45 U.S.L.W. 4768, 4770 n.7 (June 20, 1977).

Supporting that view is the expression by this Court in *San Diego Building Trades Council* v. *Garmon* that the resolution of major labor law preemption issues involves a more complicated and perceptive process which must go beyond simply "ascertaining the intent of the legislature". Further, the Court stated:

> As we pointed out the other day, "the statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." *International Ass'n of Machinists* v. *Gonzales,* 356 U.S. 617, 619, 78 S.Ct. 923, 924, 2 L.Ed.2d 1018. (359 U.S. 241)

The summary dismissal of *Kimbell,* which presented no factual record to this Court, and the conflicting views* as to the legal effect of that disposition hardly represent "concreteness" brought about by the process of "litigating elucidation". Rather, that desirable objective can only be achieved by granting this and related petitions now pending before this Court, which present exhaustive factual records.

In response to joint petitioners' assertion of circuit conflict, respondents contend that no genuine conflict exists because every circuit that has finally decided "the question" has held that "the grant of public assistance to strikers by the States is consistent with the Supremacy Clause" (R. 11). The question presented herein concerns not "public assistance" in time of need, courtesy of the state, but state compulsion of employer assistance to its striking employees, so as specifically to adjust economic relationships in collective bargaining.

Relying on *New York Telephone,* respondents contend here and in the Court of Appeals that Congress has clearly approved such assistance. But on this decisive issue, the *Grinnell* court found no clarity, only ambiguity, thus presenting a direct conflict between the fundamental premise of each decision.

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* The Third Circuit in *Super Tire* concluded that *Kimbell* disposed of the preemption question.



## CONCLUSION

**Certiorari should be granted in both this matter and in *New York Telephone* to resolve the important and controversial question presented and to minimize future litigation.**

Respectfully submitted,

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